A COMMENTARY ON CANON LAW

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A COMMENTARY ON THE NEW CODE OF CANON LAW

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De Rebus, or Administrative Law

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Matrimonial Trials (can. 1960-1992)

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FOREWORD

This Volume of our Commentary (the fifth) is published before Volume Four because of the great practical importance of the matrimonial law and because some of my clerical friends strongly urged that it be issued as soon as possible.

We have added the canons from Book IV treating of "Matrimonial Trials," not with the intention of correcting the logical order of the Code, but solely for the sake of convenience. This will, we believe, be appreciated especially by those who have to occupy themselves frequently with matrimonial matters,— we mean the diocesan court officials.

A word concerning the *sources*. The reader may perhaps be surprised at not finding a large array of secondary sources, *i.e.*, authors cited. There were two reasons which prompted moderation in this respect. The first is that we have given prominence to the primary sources as quoted by Cardinal Gasparri, which we have consulted and made discreet use of. The other reason is a practical one. The English reader does not care to cast his eyes to the bottom of the page for every assertion in the text, and we did not deem it proper to swell the bulk of the book with endless quotations.

For the rest the authors chiefly used have been mentioned among the literary sources.

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THE NEW CODE OF CANON LAW

THE LAW OF MARRIAGE

PRELIMINARY REMARKS

Marriage, from the medieval Latin word *maritaticum* (old French *mariage*), corresponds to the old Latin *matrimonium,* and signifies, in general, the union of man and woman for the purpose of procreation. This indicates the original and primary end of marriage; the difference of sex is the foundation of procreation and union is the source of generation. However this union is one of peculiar character and properties, and has been acknowledged as such by the long-standing tradition of mankind. It is not merely a mating of male and female, but a union based upon consent, such as only a human being is capable of giving.

We do not intend to enter upon an ethnographical or anthropological study of matrimony [1] or to relate the vicissitudes which it underwent among the Hebrews, Greeks, and Romans. True, Church Law has borrowed impediments from the Sacred Writings of the Chosen People [2] and also embodied Roman laws in its Code.[3] Yet, in

1 The literature may be consulted in the *Catholic Encyclopedia,* Vol. IX, 693 (by Prof. J. Ryan), and in the *New International Encyclopedia,* 1904, Vol. XIII, 86 ff.

2 For instance, the impediments of consanguinity and mixed religion.

3 The impediment of adoption is based on that law.

spite of these borrowings, Christian, more specifically, *Catholic Marriage* stands out quite singularly. First and above all, the *character* of Christian marriage is raised to the supernatural sphere through its elevation to the dignity of a sacrament. However, it would be wrong to imagine that this dignity destroyed its essential natural characteristics. For, as grace does not destroy nature but lifts it up, so neither does the sacramental character destroy Christian marriage but rather perfects it.

The primary end for which matrimony was instituted is the *procreation of children* or the propagation of the human race. This end is achieved by the means which nature dictates, *i. e.,* by the intercourse of husband and wife. Therefore, matrimony is called a union. Now a union between human beings postulates mutual *consent.* Nowhere is sexual union regarded as marriage unless it is in some way socially sanctioned,[4] and social sanction presupposes an agreement between the parties concerned. It is therefore a hazardous attempt [5] to prove from scattered texts that sexual intercourse (*copula*) alone constitutes the formal element of matrimony. This opinion confuses the essential, elementary constituent of marriage with its primary and most important purpose. That there are *secondary purposes* connected with marriage is evident. They are two: mutual help and companionship and a lawful remedy against concupiscence.[6] But these two purposes are *subordinate* to the first and primary end, which is the propagation and continuation of the human race. These three ends of marriage seem to be alluded to in the definition of Modestinus: "*Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et*

4 *New International Encyc.,* XIII, 87.

5 Freisen did this in the first edition of his *Geschichte der Quellen des Kan. Eherrechts,* but he modified his position in the second edition, 1892, p. xix.

6 Gen. II, 18; 1 Cor. VII, 9.

humani iuris communicatio." [7] *Nuptiae* indicated a marriage performed according to the Roman law, which strictly required mutual consent.[8] But there is another definition in Roman Law, *viz.: Nuptiae sive matrimonium est viri et mulieris coniunctio, individuam vitae consuetudinem retinens,*[9] *i. e.,* a union of man and woman retaining the individual custom of life. To us there seems little doubt that this definition expresses *two essential properties,* namely, unity and indissolubility. *Unity* is indicated by the singular: man and woman, not men and women. It means that this union is to be entered upon by one man with one woman, and hence polyandry as well as polygyny are deviations from the Roman as well as the Christian law of marriage, and from its typical form. *Polyandry,* or the union of several husbands with one wife, existed among some primitive tribes,[10] but in most instances was the exceptional form of conjugal union. *Polygamy* or *polygyny, i. e.,* the union of several women with one husband, existed among some ancient peoples, including the Hebrews, and still exists among some civilized nations and the majority of savage tribes. However, as has truly been observed, the great majority of peoples are monogamous, and the other forms of marriage are usually modified in a monogamous direction.[11] The Greeks and Romans show no traces of polygamy. The latter also prove the *indissoluble* character of matrimony as opposed to complete divorce. For up to the year 520 A. U. C. there was no divorce in Rome, and Sp. Carvilius Ruga greatly surprised his fellow-citizens by departing from the ancient custom.[12] At Athens divorce was more easily ob-

7 L. 1, Dig. 23, 2, *de ritu nuptiarum.*
8 L. 2, ib.; pr. Iust., I, 10.
9 L. 1, Inst., I, 9.
10 Cfr. *Cath. Encyc.,* ix, 694.
11 Westermarck, *The History of Human Marriage,* 1891, p. 510.
12 Cfr. Savigny, *Vermischte Schriften,* 1850, Vol. I, p. 81 ff.

tained, especially by the husband, whereas Sparta long maintained the purity of marriage.[13] The early Christian emperors, Constantine, Theodosius, and Justinian, legalized divorce, but before the tenth century the Catholic teaching on the indissolubility of marriage had become embodied in the civil legislation of every Christian country.[14] At the time of the Reformation, the Protestant Churches of the Continent rejected the sacramental character of marriage and admitted divorce.[15] Luther regarded matrimony as a purely secular matter, which should be regulated by civil law. This was done, and in the nineteenth century, the State took marriage entirely under its control, though civil marriage had already been imposed in Holland in 1580, Cromwell had introduced it in England and Ireland in 1653, and France required it for the Huguenots in 1685. But these are rather solitary examples. The nineteenth century, ushered in by the French Revolution, produced a wholesale civil legislation concerning marriage.

A civil marriage is one contracted according to the laws of the country before a civil magistrate and having a legal status without regard to ecclesiastical legislation.[16] Not all countries prescribe civil marriage in the same manner, but three kinds may be distinguished:

(1) *Optional* or *facultative civil marriage,* which leaves the parties free to contract marriage *either* before the civil magistrate *or* before the ecclesiastical authorities. This, we may safely say, is the statutory law in the U. S. And here it may be added that Lord Hardwicke's Act[17] was never applied to the colonies and therefore never be-

13 Müller-Bauer, *Die griech. Privat- und Kriegsaltertümer,* 1893, pp. 152, 142.

14 *Cath. Encyc.,* IX, 696.

15 *New International Encyclopedia,* XIII, 90.

16 De Smet, *De Sponsalibus et Matrimonio,* ed. 2, 1910, p. 304.

17 Acts Geo. II, c. 33.

came a part of the common law of the United States. This Act demanded that a church marriage be preceded by the publication of banns, except when a special license was secured, and declared any other form of marriage invalid. This act was modified for *England* by Lord Russell's Act, and supplemented by others.[18] This legislation left a choice between marriage according to the forms of the Established Church, marriage according to the forms of other registered denominations, and civil marriage before a registrar. But a registrar's certificate is required also for Catholics. In nearly all the *States of the Union* statutes have been enacted providing for a ceremonial marriage, and in most cases requiring also a license granted by a properly constituted officer. The ceremony is to be performed in the presence of two or more witnesses by a priest or clergyman of some church, or by certain civil magistrates, such as judges of courts of record, justices of the peace, police justices, mayors, aldermen of cities, and county clerks. Where the State [19] does not require this formality for a valid marriage, an informal marriage would be valid, though liable to prosecution. It follows that a clergyman, either Catholic or non-Catholic, who can prove his ordination by credentials, is a public civil official when he assists at marriage and in this regard is in no wise distinguished from a judge of the superior or county court or a justice of the peace.[20] It is evident that the State has the right to demand certain qualifications and conditions in the minister [21] of matrimony as

18 Acts Vict., c. 21 and 19, 20, Vict., c. 119.

19 According to the *New Intern. Ency.* (*l. c.*, p. 92), the following States insist on this formality under an invalidating clause: Cal., Ky., Md., Mo., Mass., N. C., Vt., Wash., W. V.

20 K. Zollmann, *American Civil Church Law*, 1917, p. 332.

21 The term *minister* is here used in its legal, not its ecclesiastical, sense.

well as in the contracting parties. Civil marriage in this sense can hardly be called objectionable.[22]

(2) *Necessary civil marriage* is that conditionally required by the State if the contracting parties belong to no religious sect or suffer from an ecclesiastical (not civil) impediment. Such a law exists in Austria since May 25, 1868.

(3) *Civil marriage* is called *obligatory* if it is prescribed by the State as an absolutely necessary condition to obtain civil acknowledgment of the matrimonial status with all its effects. The countries which have introduced it deny any civil effect or consequence to the religious ceremony and disregard ecclesiastical legislation. Obligatory civil marriage is in force in Belgium (Code, art. 109), France (Code civ., tit. 2), Germany (Bürgerl. Gesetz-Buch, §§ 1316–1322), Holland (Const. of 1833), Hungary (law of Dec. 9, 1894), Italy (Codice Civile, lib. I, tit. 5, art. 93–99), and Switzerland (Dec. 23, 1875, art. 29–43).

Against this abuse the Catholic Church, for obvious reasons, has never ceased to raise her voice. Her chief objections to obligatory civil marriage are: it deprives marriage of its sacred character, obstructs the legislation of the Church concerning her Sacraments, encourages divorce, and fosters religious indifference.[23]

ECCLESIASTICAL LEGISLATION

The Code speaks of ecclesiastical legislation in two different places. One canon [24] says that matrimony among baptized persons is governed not only by divine, but also by canon law. Another text [25] states that the supreme ecclesiastical authority alone has the right to judge

22 England has optional civil marriage since 1836; Ireland since Aug. 29, 1844; Scotland since Aug. 7, 1854; Spain since 1883.

23 Leo XIII, *"Ci siamo,"* June 1, 1879.

24 Can. 1016.

25 Can. 1038, 1040.

whether divine law prohibits or invalidates matrimony, and to establish ecclesiastical impediments, and that no inferior authority may abrogate or derogate from such impediments or dispense from them. It would, however, be unhistorical to assert that this centralized legislation has been in force always. The fact is that the Council of Trent [26] first defined as an article of faith the power of the Church to establish impediments. The different impediments were determined gradually, as will be seen further on. Gratian [27] says that in his time marriages were governed not by civil, but by ecclesiastical law, as bishops and metropolitans decided matrimonial cases, especially at synods. This particular, local or provincial, legislation did not, however, prevent appeals to the Roman See, particularly from princes and nobles, as Lothair II (855–869) and Robert I (922–923).

Matrimonial laws were issued by Nicholas I (858–87) in his answers to the questions proposed by the Bulgarians.[28] The same Pope also stated the principle which should govern the application of civil laws to this subject. These, he says, must not be used for settling ecclesiastical controversies, especially if they are contrary to the evangelical teaching and canons.[29] The same view is expressed with regard to the civil law admitting divorce by SS. Ambrose [30] and Jerome. The latter says: The laws of Christ differ from those of the Caesars, and what Paul prescribes differs from what Papinianus says.[31] Hippolytus reproaches Pope Callistus for permitting noble Roman ladies to marry slaves, which was against the civil law.[32]

26 Sess. 24, cc. 3, 4, *de Mat.*

27 Dictum ad c. 7, C. 2, q. 3: *"Cum Matrimonia hodie regantur iure poli, non iure fori."*

28 C. 2, C. 27, q. 2; c. 3, C. 30, q. 5.

29 C. 1, Dist. 10.

30 C. 2, C. 33, q. 2; ep. 60, c. 8 (Migne, 16, 1185).

31 *Ep. ad Ocean.*, 77, 3.

32 Döllinger, *Hippolytus und Kallistus*, 1853, p. 158 f.

Justin Martyr condemns concubinage and divorce as admitted by the civil law and says that those who practice polygamy, even though they may be in accord with human law, are sinners in the eyes of the Church.[33] From these few scattered testimonies it may be seen that the Church maintained her own matrimonial regulations and opposed civil enactments contrary to her teaching. The chief and most important laws were those upholding the unity and indissolubility, which are the main properties of Christian marriage, as understood by the Church. She authoritatively interpreted many texts of Holy Writ,[34] and from her interpretation important conclusions were drawn in the realm of Canon Law.

Properly speaking, there are no *sources of matrimonial law,* because it was a part and parcel of ecclesiastical legislation. Thus *Gratian* refers to marriage in the Causae XXVII to XXXVI of his "*Decretum*" with the exception of q. 3, C. XXXIII *de Poenitentia.* The *Quinque Compilationes* as well as the Decretals treat of Matrimony in Book IV. After the Tridentine Council the decisions of the S. C. Concilii were of great help to the canonist. Many of these decisions are found in John Baptist Pittono's "*Constitutiones Pontificiae et Rom. Congregationum Decisiones ad Matrimonium Spectantes,*" Venice, 1735; in Gallemart's "*Concilium Tridentinum,*" Venice, 1780; in Zamboni's "*Collectio Declarationum S. C. Concilii,*" Atrebati, 1860; in Richter's "*Canones et Decreta Concilii Tridentini,*" 1853. A very important collection containing much matter on our subject is the "*Collectanea S. C. de Prop. Fide,*" Rome, 1907, 2 vols. Since Pius X's decree "*Ne temere*" (Aug. 2, 1907) the decisions on the same given by the S. C. Concilii and the S. C. Pro Re

33 *Apol.,* I, 15.

34 Gen. 2, 23; Matth. XIX, 4 ff.; Eph. V, 25, 32; 1 Cor. VII, 11 ff.

Sacramentaria are valuable sources of information.

As to the *literary apparatus,* the following works may be profitably consulted: *"Lex Dei sive Mosaicarum et Romanarum Legum Collatio"* [35] of the fifth century; *"Lex Romana Canonice Compta"* (§ 27–32), interesting as a monument of the eighth century for reckoning the degrees of relationship; [36] the collections of Burchard of Worms, *"Decretum"* (lib. VII and IX) and Ivo of Chartres, *"Decretum"* (lib. VIII) and *"Panormia"* (lib. VI). A very interesting monograph is the work of Hincmar of Rheims, *"De Divortio Lothari Regis et Theutbergae Reginae."* [37] Rhabanus Maurus composed a *"Tractatus de Consanguinorum Nuptiis."* [38]

Noteworthy are the *"Summae de Matrimonio"* of BernardusPapiensis,[39] Robert of Flamesbury,[40] and Tancred,[41] and Roffredus de Epiphanio's *"Libelli de Iure Canonico,"* [42] especially book III. John Andreae compiled a *"Summa de Sponsalibus et Matrimonio cum Arbore Consanguinitatis."* [43]

Works of authors chiefly consulted by us are the commentaries of Fagnani, Engel, Reiffenstuel, Schmalzgrueber, Boeckhn, Wernz (fourth book). A classical work is the Jesuit Thomas Sanchez's *"De S. Sacramento Matrimonii"* (Nuremberg, 1706). Besides these the manuals of Heiner (1905), Leitner (1912), Smith's *Marriage Process* (1892), Gasparri's *De Mat.,* ed. 3; Feije's *De Imped. et Dispensat. Matrim.,* ed. 3; v. Scherer's *K.-R.,* vol. II, have proved a great help in the making of this commentary. Of course, these sources and authors,

35 Freisen, *l. c.,* p. 2.

36 Published by M. Conrat (Kohn), Amsterdam, 1904, pp. 29–35.

37 Migne, *P. L.,* 125, 619 ff.

38 *Ibid.,* 110, 1085 ff.

39 Ed. Laspeyres, 1860, Appendix, pp. 287 ff.

40 Cfr. Schulte, *Quellen,* I, 208 f.

41 Ed. Wunderlich, 1841.

42 Cfr. Schulte, *l. c.,* II, 75 f.

43 Friedberg, *Decretum Magistri Gratiani,* p. 426.

though still useful, are now somewhat antiquated. Concerning dispensations and procedure mention may be made of Giovine, *De Dispensationibus Matrimonialibus,* 1863; Joder, *Formulaire Matrimonial,* 1891; Zitelli, *De Dispensationibus Matrimonialibus,* 1884; Mansella-Solieri, *De Causis Matrimonii,* 1906. For *historical researches* we used Esmein, *Le Mariage en Droit Canonique,* 1891, and Freisen, *Geschichte des Kan. Eherechts,* 2nd ed., 1902. On the *physiological* and *medical* aspects we consulted Antonelli, *Medicina Pastoralis,* 1909; Eschbach, *Disputationes Physiologico-Theologicae,* 1901; and O'Malley-Walsh, *Essays in Pastoral Medicine,* 1911.

Klarman, A., *The Crux of Pastoral Medicine,* 1915.

Since the publication of the first edition of our Commentary, the following works have come to our notice:

Ayrinhac, H. A., S. S., *Marriage Legislation in the New Code of Canon Law,* 1919.

Cappello, F. M., S. J., *Tractatus Canonico-Moralis de Sacramentis iuxta Codicem Iuris Canonici,* Vol. III, *De Matrimonio,* 1923.

De Smet-Beyaert, *De Sponsalibus et Matrimonio,* 1927.

Farrugia, N., O. S. A., *De Matrimonio et Causis Matrimonialibus, Tractatus Canonico-Moralis iuxta Codicem Iuris Canonici,* 1924.

TITLE VII

ON MATRIMONY

CAN. 1012

§ 1. Christus Dominus ad sacramenti dignitatem evexit ipsum contractum matrimonialem inter baptizatos.

§ 2. Quare inter baptizatos nequit matrimonialis contractus validus consistere, quin sit eo ipso sacramentum.

The Lord Christ himself has raised the marriage contract between baptized persons to the dignity of a Sacrament, and hence there can be no valid marriage contract between baptized persons which is not at the same time a sacrament.

This canon enunciates two truths which no Catholic is at liberty to deny, *viz.*: (1) that matrimony is a Sacrament, and (2) that the marriage contract is the sacrament. To which must be added (3) that both statements apply only to baptized persons.

1. *Marriage is a Sacrament,* that is, as Dogmatic Theology proves, a visible sign instituted by Christ as a means of sacramental grace. The sign consists of matter and form, which are described by Benedict XIV as follows: The mutual and lawful surrender of the bodies indicated by words or signs expressing the interior consent is the *matter* of the Sacrament, whilst the mutual

and lawful acceptance of the bodies is its *form.*[1] Hence the *remote matter* are the bodies of the contracting parties. Bodies, we say, as far as they are apt for generation, which is the primary end of marriage. A contract is made by two persons fit for marriage, and this contract is expressed by the mutual *consent,* which is an essential condition of a valid marriage.

The visible sign or nuptial consent conveys *sacramental grace,* according to the teaching of St. Paul, Eph. V, 25–32, where the matrimonial contract is represented as a symbol of the union between Christ and His Church. When Christ raised marriage to the dignity of a Sacrament is a matter of theological speculation.[2] Some say, at the wedding feast of Cana in Galilee; others, when He uttered the words recorded in Matt. XIX, 8, on His journey to Jerusalem; others, after the Resurrection.

The *grace* attached to the sacrament of matrimony corresponds to the threefold effect which usually follows marriage: (a) the *bonum sacramenti,* or sacramental effect, which is potential indissolubility or inseparability in a higher degree accruing to marriage by reason of the Sacrament; (b) the *bonum fidelitatis,* which touches the secondary purpose of marriage, *viz.:* mutual help and restriction of concupiscence; for the sacrament conveys the title to the actual graces necessary in the discharge of the duties of the married state; (c) the *bonum prolis,* or offspring, which is quasi-sanctified by a Christian marriage. Out of Christian wedlock are born children for the propagation of the Church.[3] Lastly, the education and bringing up of the children is ennobled by sanctified love.

1 *"Paucis abhinc,"* March 19, 1758 (*Bull.,* Prati, t. IV, app., p. 495).

2 Cfr. Pohle-Preuss, *The Sacraments,* Vol. IV, p. 151.

3 Cf. 1 Cor. 7, 14.

Matrimony being one of the Sacraments of the living, supposes the state of sanctifying grace. Should there be an obstacle (*obex*) at the time the contract is made, the sacramental grace is received as soon as this obstacle is removed.

That Marriage is a Sacrament conveying grace is an article of faith.[4] The Church condemned the tenets of the Gnostic Encratites, the Manichaeans, and the Albigenses, as well as that of the Protestants, who regard marriage as a purely worldly matter.

2. That contract and Sacrament cannot be separated is not strictly *de fide,* but "common and certain teaching," because the contrary proposition was condemned in the Syllabus of Pius IX (1864).[5] The Gallicans and Josephinists maintained that the sacramental character is purely adventitious and may be separated from the contract, and that the sacrament is constituted by the nuptial blessing.[6] This sounds very pious, but the purpose actuating these authors was obviously to subject the contract to the State and leave the nuptial blessing alone to the Church. We do not wish to say, however, that the theory was entirely destitute of a theological prop, because Melchior Canus (1560) and Tournely of the Sorbonne had defended the opinion that the sacerdotal blessing constituted the form of matrimony and that, consequently, the assisting priest was the real minister of Marriage. This opinion was novel. St. Thomas[7] and the *Decretum pro Armenis*[8] plainly state that the efficient cause of Matrimony is the mutual consent expressed by words in the present tense. It follows that the *priest* is not the minister of the Sacrament, but merely an *authorized witness.* But this view

4 Trid., sess. 24, can. 1 de mat.

5 Nn. 66, 73.

6 The names of Antonio de Dominis, Launoy, Theimer, Ziegler, J. N. Nuitz, Professor of Turin, are known.

7 *Suppl.,* III, q. 42, art. 1, ad 1.

8 Denzinger, n. 702.

involves a difficulty. If the matter and form of Matrimony essentially consist in the mutual surrender and acceptance of the bodies, as expressed by conclusive signs, how could the Church have dared to add something to the essential elements by requiring the presence of the priest for the validity of Marriage? The answer is that the Church, while preserving the matter and form of the Sacraments, is empowered to add new conditions of validity if the public welfare or other grave reasons advise such a course.[9] In doing so she does not change the essentials of the contract, but for the sake of public utility or necessity surrounds the contract with certain formalities that must be observed. Similarly the State prescribes certain formalities which must be observed before a contract receives official sanction and obtains juridical effects.

3. The Code adds in both paragraphs: "*matrimonium inter baptizatos*," *i. e.*, only among baptized persons is the nuptial contract a Sacrament. The reason lies in the character of Baptism, which impresses on the soul the indelible mark of Christian initiation or dedication, and is therefore a *conditio sine qua non* of the Sacrament of Matrimony, though not its *causa efficiens*,[10] which is the mutual consent of the contracting parties.

Here two questions occur: (a) is *Marriage between a non-baptized person and a baptized person a Sacrament?* The answer, according to the more probable opinion, is no, because an infidel is absolutely incapable of receiving sacramental grace, and since the Sacrament is numerically one in both parties, as is the contract, when one party is incapable of receiving the Sacrament, the other is also in-

9 Cfr. St. Thomas, *Quaestiones Quodlibetales*, V, q. 8, art. 15, ad 1; Benedict XIV, "*Paucis abhinc*," March 19, 1758.

10 Thus Leitner, *Eherecht*, 1902, p. 61.

capable.[11] The argument from the jurisdiction which the Church claims over such marriages is unsound because this jurisdiction is claimed by reason of one person belonging to the Church.

(b) *Does the Marriage of an unbaptized couple become a Sacrament if they receive Baptism without renewing their consent?* Sanchez and the majority of authors answer in the *affirmative,* and most logically, because the matrimonial consent endures and by the reception of Baptism the contract becomes a sacramental union symbolizing the union of Christ with His Church.[12] The same holds good concerning Matrimony by *proxy.* Such a marriage, if duly contracted, does not differ substantially from any other, and since the Sacrament cannot be severed from the nuptial contract, a marriage by proxy is a true Sacrament.[13]

We will add a note on the different Latin names given to Marriage.

Matrimonium is derived from the office (*munus*) of the mother (*mater*), because the principal purpose which a woman should have in getting married is to become a mother.[14]

Connubium is derived from *nuptiae* (*nubere*), to veil, and meant, according to Roman law,[15] the rite of marriage, and also the privileged Marriage of Roman citizens among themselves; marriage between slaves they called *contubernium.* Nuptials in the Christian sense also signified a rite because, as St. Ambrose observes, brides veiled themselves as a sign of modesty.[16]

Coniugium, or wedlock, denotes the conjugal union,

11 Sanchez, l. II, disp. VIII.
12 *Ibid.,* l. II, disp. IX.
13 Cfr. Pohle-Preuss, *l. c.,* p. 163.
14 See the explanation in c. 2, X, III, 33.
15 Dig. 23, 2.
16 Cfr. *Catech. Conc. Trid.,* P. II, c. 8.

the effect of the marital consent being to make the two one flesh.[17]

Christian Marriage may therefore be *defined* as the lasting conjugal union between a capable man and a capable woman, raised to the dignity of a Sacrament.

Can. 1013

END AND PROPERTIES OF MARRIAGE

§ 1. Matrimonii finis primarius est procreatio atque educatio prolis; secundarius mutuum adiutorium et remedium concupiscentiae.

§ 2. Essentiales matrimonii proprietates sunt unitas ac indissolubilitas, quae in matrimonio christiano peculiarem obtinent firmitatem ratione sacramenti.

1. As stated in the preliminary remarks, the *primary end of Marriage* is the procreation and education of offspring, while its secondary purposes are mutual help and allaying concupiscence. The latter are entirely subordinate to the former. The consequences of this proposition will be seen more palpably under can. 1068, can. 1086, § 2, and can. 1092.

2. The *essential properties* of Marriage are unity and indissolubility, which obtain a special firmness or stability in Christian Marriage by reason of its being a sacrament. This firmness must be traced to the typical union between Christ and His Church and also to the sacramental grace attached to Christian Marriage. The Code therefore distinguishes between marriage as a natural contract and Christian Marriage. But this distinction, as stated in the preceding canon, does not touch the consent or its properties essentially, but merely in

17 Sanchez, *l. c.*, Prooem., n. 4.

degree. A Marriage between non-baptized persons is as essentially *one and indissoluble* as between baptized persons, but there are degrees of stability in so far as a non-consummated Marriage can be more easily dissolved and Christian Marriage represents the typical union between Christ and His Church and through its sacramental character possesses greater firmness, although it is not completely indissoluble.

Unity is another essential property of every Marriage, whether Christian or non-Christian. An objection here naturally arises as to the Old Testament. Lamech, a great-grandson of Cain, took two wives,[18] and the holy patriarchs followed his example. Therefore *polygamy* (or polygyny) and divorce seem to have been legalized by the law of Moses.[19] How was such a deviation from the natural law — if the latter prohibits polygamy — possible? This question was solved by Innocent III, and we have not yet discovered a better solution. He says that the Patriarchs and the Chosen People as a whole had by divine revelation obtained permission to have several wives.[20] The reason for this permission was the more rapid increase of God's people, and, in general, of the human race. However, under the new dispensation, after Christ had restored[21] the original idea of marriage, this concession ceased.

Now the further question arises: How could Yahweh dispense from the natural law? Here it is necessary to make a distinction. The natural law pure and simple ("do good and avoid evil"), in other words, the primary natural law, cannot be proved to condemn either polygyny or divorce. But if we take natural law as meaning the

18 Gen. 4, 19.
19 Deut. 17, 17; 21, 15 f.; 24, 1 ff.
20 C. 3, *Gaudeamus*, X, IV, 19, *de divortiis*.
21 Matth. 19, 4 ff.

conclusions or deductions drawn from the original or primary law, it is opposed to polygyny and divorce. The reasons are given by St. Thomas [22] as follows:

(a) *The certainty of offspring* is jeopardized by polyandry, which therefore must be rejected altogether. Polygamy impedes the training of children, which not only belongs essentially to the purpose of marriage, but also forms a substantial care of the father. Where there is unity of marriage, as a rule, there is also uniform and tender care of offspring.

(b) The *equality of woman,* especially as to mutual rights and love, is lessened by polygamy, the wife is little more than a slave, and the dignity of womanhood is lowered. This reason, we believe, will appeal strongly to modern women.

(c) *Divided love* cannot be so intensive and lasting as love centred on one. This reason also touches the indissolubility of the marriage tie and the education of children.

(d) Baptismal records prove that the *numerical distribution* of the sexes is about *equal,* at least in normal times. Add to these reasons the social equality of men; for to have several wives is expensive and only the rich could afford this luxury.

As to *indissolubility,* the reasons just stated may be alleged in a modified way also against complete divorce. St. Thomas [23] says that:

(a) The uniform and constant *care of offspring* requires permanency of the marital bond or the continued cohabitation of father and mother.

(b) The right of the wife to desert her husband is neu-

22 *Summa contra Gentiles,* III, c. 124; *Suppl.,* III, q. 65, a. 1, ad 8. Sanchez, *l. c.,* l. VII, disp. 80.

23 *Summa contra Gent.,* III, c. 123.

tralized by the fact of her subjection to him; and if the wife is not allowed to leave her husband, he is not allowed to leave his wife, else there would be *inequality of rights*.

(c) The *more intense mutual love is,* the more enduring and lasting will it be; and thus loyalty is fostered by a permanent union, which, moreover, prevents serious dissensions and quarrels and diminishes the occasions for adultery or unlawful unions.

We need not dwell further on this subject, as the divorce evil, especially in our large cities, is constantly producing effects which confirm the wisdom of the Catholic attitude.

In view of these facts it is plain that the Church was right in anathematizing those who, like Luther and Melanchthon, admitted simultaneous polygamy,[24] and in proscribing divorce in these severe terms: "If any one saith that on account of heresy, or irksome cohabitation, or feigned absence of one of the parties, the bond of marriage may be dissolved, let him be anathema." [25]

Can. 1014

FAVOR IURIS

Matrimonium gaudet favore iuris; quare in dubio standum est pro valore matrimonii, donec contrarium probetur, salvo praescripto can. 1127.

The law always favors Marriage, and hence if a doubt arises as to the validity of any particular Marriage, the presumption is in its favor until the contrary is proved (excepting the case of the *Privilegium Paulinum;* see can. 1127).

24 *Trid.*, sess. 24, can. 2, *de sac. mat.*
25 *Ibid.*, can. 5.

The reason for this ruling lies in the fact that Marriage is a public, not a private, institution, and that consequently the legislator always intends to favor it by his dispositions, which are therefore of the nature of a favorable law (*lex favorabilis*).[26] However the presumption mentioned, while called "*praesumptio iuris,*" is not a *praesumptio iuris et de iure.* Solid proofs are admissible against it if a doubt should arise as to whether a Marriage is valid. If the reasons against the validity of a Marriage are such as to convince the mind of the judge, he must pronounce accordingly. For although the law favors the validity of Marriage, yet, as law it pertains to reason, and hence is subject to the demands of reason. Where conviction is complete, the law ceases to exercise its force. The Holy Office[27] has given a decision to the purpose. A girl whose precise age was unknown wanted to marry or was married. Was it valid? The Vicar Apostolic was instructed to procure undoubted testimonies as to the natural capacity of the girl for marriage. "*Malitia supplet aetatem,*" and only if the marks of puberty were missing and the necessary age (twelve years) was lacking the Marriage was certainly invalid. In other words, the natural impediment of age ceases as soon as there is a natural capacity for generation.

The *privilegium fidei* will be explained under can. 1027.

Can. 1015

SPECIES OF MARRIAGE

§ 1. **Matrimonium baptizatorum validum dicitur *ratum,* si nondum consummatione completum est;**

26 Sanchez, l. I, disp. I, n. 4; Reiffenstuel, *De Reg. Iuris in 6°,* reg. 15, n. 2 f.

27 March 18, 1903, referred to by Card. Gasparri (see *Coll. P. F.,* n. 2165); S. O., Dec. 10, 1885 (*Coll. cit.,* n. 1645). But can. 1067 is not affected thereby.

ratum et consummatum, si inter coniuges locum habuerit coniugalis actus, ad quem natura sua ordinatur contractus matrimonialis et quo coniuges fiunt una caro.

§ 2. Celebrato matrimonio, si coniuges simul cohabitaverint, praesumitur consummatio, donec contrarium probetur.

§ 3. Matrimonium inter non baptizatos valide celebratum, dicitur *legitimum.*

§ 4. Matrimonium invalidum dicitur *putativum,* si in bona fide ab una saltem parte celebratum fuerit, donec utraque pars de eiusdem nullitate certa evadat.

§ 1. A valid marriage, contracted between baptized persons, is called ratified (*ratum*) as long as it has not been consummated by conjugal intercourse; *ratified and consummated,* if perfected by the conjugal act to which matrimony is by nature directed and by which the partners become one flesh.

§ 2. If the parties have lived together after the celebration of marriage, *consummation is presumed,* until the contrary is proved.

§ 3. A marriage validly contracted between unbaptized persons (*e. g.,* Mohammedans, Jews, Gentiles) is *legitimate* but not sacramental.

§ 4. An invalid marriage is called feigned (*putativum*) if contracted in good faith by at least one party, until both become aware of its invalidity.

As to the first paragraph, note the requirement of consummation, which, the Code says, must be a *conjugal act.* Carnal intercourse before marriage is fornication, not a conjugal act. Nor can onanistic [28] intercourse be re-

28 Thus called from Onan; see Gen. 38, 9 f.

garded as a consummation,[29] though it is not required that the wife should cooperate actively in the act.[30] Other questions connected with this matter will be discussed in connection with impotence.

In § 2 the Code requires strict proof as to the non-consummation of a Marriage if the parties have lived together after the wedding. This proof must be obtained by inspection on the part of two physicians or competent nurses or midwives, unless circumstances render such inspection unnecessary,[31] as when, for instance, it could be established by trustworthy witnesses that one of the parties left the other immediately after the matrimonial celebration,[32] or if the woman had been a prostitute.

That a valid Marriage between unbaptized persons is simply called legitimate (§ 3) points to a natural contract to which no sacramental character is attached.

Can. 1016

THE LAW OF MARRIAGE

Baptizatorum matrimonium regitur iure non solum divino, sed etiam canonico, salva competentia civilis potestatis circa mere civiles eiusdem matrimonii effectus.

The Marriage of baptized persons is governed not only by the divine law, but also by canon law, with due regard to the competency of the civil power concerning the merely civil effects of Matrimony.

Note the *two powers* mentioned in the text: the ecclesiastical and the civil, and remember that the text says,

29 Cfr. c. 36, C. 27, q. 2; c. 11, C. 35, q. 2 and 3; Sanchez, l. II, disp. 21, nn. 1, 5.

30 Sanchez, *l. c.*, n. 11, says that this is the more common opinion, although he maintains that the *seminatio* of both parties is required for consummation.

31 Cfr. can. 1976 ff.

32 S. C. Prop. Fide, May 10, 1801.

baptizatorum matrimonium, the marriage of baptized persons. The Church therefore claims jurisdiction over the Marriages of baptized persons. What is the reason for this claim? The scope of Marriage is the generation or procreation of offspring. This has a threefold aim: (1) the perpetuation of the human race, which is embodied in nature itself, because nature inclines towards it; (2) the continuation of civil society, and as such marriage is subject to the State; (3) the peopling of the City of God and increase of the number of the faithful, and from this point of view Marriage is subject to the Church.[33]

However, the last-mentioned consideration would not be sufficient to vindicate to the Church the power of controlling Marriage to the full extent to which she claims it, namely, in every respect excepting its purely civil effects. Whence has she this power? Her claim is based upon the view she takes of Marriage as a Sacrament. As the sacramental character of marriage cannot be separated from the underlying natural contract, and as all *strictly spiritual matters,* such as the Sacraments, belong to the exclusive sphere of ecclesiastical legislation, the Church logically claims full and unhampered power over the Marriages of baptized persons. As these *persons*[34] are themselves, by reason of valid Baptism, subject to the Church, it is evident that she has a legal right to regulate their matrimonial union.

As to the *extent* of this power, it embraces the whole range of the nuptial contract, aside from its purely civil effects. Thus *engagement* or betrothal, as a preliminary to marriage,[35] falls under the legislation of the Church.

33 St. Thomas, *Summa contra Gentiles,* IV, 78.

34 Cfr. *Trid.,* sess. 7, can. 7; can. 8, *de baptismo.*

35 "*Tametsi,*" *Trid.,* sess. 24, c. 1, *de ref. mat.*; "*Ne temere,*" Aug. 2, 1907, n. I.

Marriage as a *contract in fieri,* or the transient act of matrimonial consent, is also subject to the Church, as long as the substance of the natural consent is not essentially changed. Therefore, the Church may add accidental formalities to the wedding ceremony, as she has done by demanding a public act,[36] and she may set up *impediments,* either prohibitive or invalidating marriage, touching the persons themselves or the solemnity of the contract.

Of course, the Church could never abolish or supply the conditions of the natural contract. Neither could she declare persons who are incapable of contracting marriage to be capable. For she has no right to change the natural law, although she may interpret it as well as the divine positive law.

It is not our task to prove from history the power of the Church to establish matrimonial impediments. We merely note that ecclesiastical impediments, being established by human authority, are liable to change, because the power of the Church is not for destruction but for edification and the welfare of society, and what may suit one age may be useless and even detrimental in another.

Finally the power of the Church extends to the *vinculum perdurans* or marriage as a legal status. With regard to that enduring union, only ratified marriages, not those consummated, may be solved by the Church for weighty reasons. Here enter the *"Privilege of faith,"* the separation from bed and board, the prohibition of the use of the conjugal act as a punishment for crimes committed, and finally the legitimation of offspring.

What has been said so far must be accepted as the *common* and *certain doctrine* of the Catholic Church

[36] Benedict XIV, *De Syn. Dioec.,* IX, 9, 4; Wernz, *Ius Decretal.,* IV, ed. 2, 1911, Vol. 1, pp. 78 ff.

uttered in solemn form at the Council of Trent [37] and in papal constitutions.[38]

We again draw attention to the text: "*matrimonium baptizatorum,*" the marriage of baptized persons. Notice that we use the genitive, instead of saying, "between" baptized persons. The reason for this distinction is: when we say: *between baptized persons,* we mean that both parties are baptized; while if we say: *of baptized persons,* we do not necessarily intend to say that both parties are baptized. Thus James may be baptized, whereas his bride Gemma is not. May the Church dictate what James has to do? Or, in other words, has the Church any power to legislate concerning mixed marriages, taking the word "mixed" in the wider sense as including disparity of religion? The answer is *affirmative* if we accept the view taken by several popes. Thus Innocent III and Honorius III say that the Sacrament of Matrimony exists among the faithful as well as among infidels.[39] Leo XIII, after citing these texts, concludes that since marriage is by its very nature a sacred thing, it is meet that it be regulated and directed, not by civil rulers, but by the divine authority of the Church, who is the sole teacher in sacred matters. The underlying idea is that Marriage, having God for its author, foreshadowed the Incarnation of the Word, and is therefore something sacred both by its institution and as a type.[40] There it is also said that "to decree and ordain about the Sacrament is, by the will of Christ, so much a part of the power and duty of the Church, that it is plainly

37 *Trid.*, sess. 24, can. 3, 4, 9, 12, *de sacr. mat.*

38 Benedict XIV, *"Singulari nobis,"* Feb. 9, 1749; Pius VI, *"Auctorem fidei,"* Aug. 28, 1794, nn. 59, 60; Pius IX, *Syllabus,* nn. 68, 69, 70, 71, 72, 74; Leo XIII, *"Arcanum,"* Feb. 10, 1880.

39 C. 8, X, IV, 19, *de divort.*; c. 11, X, I, 36, *de transact.*

40 *"Arcanum."*

absurd to maintain that even the smallest particle of such power has been transferred to the civil ruler." Can this reason, *viz.,* the sacred character or *res sacra,* be urged in case of a mixed marriage, *i. e.,* one between a baptized and a non-baptized person? If the typical significance is stressed,[41] these unions, too, and, in fact, all marriages should fall under ecclesiastical legislation. To this assumption and consequence not a few authors would certainly take exception.[42]

A more solid argument is that derived from the purpose of marriage as a means of propagating the Church. If one of the contracting parties is, by Baptism, a member of the Christian community, he is subject to the Church, whose sign and seal he has received, and therefore must obey her laws, which bind and oblige all her members, whether they are willing or not. For the Church not only is entitled, like any other society, to defend her own interests, but she is also obliged to repel dangers from individuals. And, as sad experience teaches, many dangers attend mixed marriages. Therefore, both by reason of her jurisdiction over her members and in virtue of her divine calling, the Church is empowered to regulate Marriages, even if only one of the contracting parties belongs to her pale.

A most important question, which reflects on the whole range of ecclesiastical impediments in general, and on that of disparity of worship in particular (can. 1070), must here be touched. *Who are meant by the term baptized?* For the text says "*Matrimonium baptizatorum.*" The answer can be deduced from the text itself. But

41 Wernz, *l. c.,* IV, Vol. I, p. 85, insists too strongly on this argument.

42 We refer the reader to what was said on this question on page 14 f.

we shall first attempt to sum up the doctrine of the Church held up to the moment of the promulgation of the Code.

(a) Valid Baptism *per se* incorporates a person in the body of the Church, and by Baptism all are subject to the laws of the Church.[43]

(b) Hence *heretics,* too, if validly baptized, were bound by the *impediments of ecclesiastical law,* for instance, disparity of worship.[44]

(c) An express exception was made with regard to non-Catholics when they marry among themselves, because they are not obliged to observe the *form* prescribed.[45]

(d) Our Code appears to restrict *disparity of worship* to Catholics, as will be seen under can. 1070. Hence from May 19, 1918, this impediment *de facto* touches only Catholics.

So far our statements are borne out by the common doctrine of the Church and the present Code. But are the other impediments *iuris ecclesiastici* also abolished by the Code? It is certain that the Code legislates only for Catholics, but that it is the intention of the legislator to declare all baptized non-Catholics free from other ecclesiastical laws and impediments, we cannot maintain.[46]

COMPETENCE OF THE CIVIL AUTHORITY

Canon 1016 grants to civil or secular law a certain competency in matrimonial matters, which, however, touches only the civil effects of marriage contracted by

43 *Trid.*, sess. 7, can. 7 f., *de bapt.*

44 Bened. XIV, *"Singulari Nobis,"* Feb. 9, 1749, § 1; *"Magnae Nobis,"* June, 1748; *"Ad tuas manus,"* Aug. 8, 1748; S. O., Inst. of March 20, 1860 (*Coll. P. F.*, n. 1318); S. C. C. 1903 (*Anal. Eccl.*, XI, 284 ff.), etc., etc.; can. 87.

45 *"Ne temere,"* Aug. 2, 1907; Can. 1099, § 2.

46 This is also the view of a Roman professor of Canon Law.

baptized persons. These civil effects have to do with the dowry, the right of succession, the division of property between husband and wife, the right of children to titles and property, and similar merely material matters. For the Church, says Leo XIII, is not unaware, and never calls in doubt, that the Sacrament of Marriage, being instituted for the preservation and increase of the human race, has a necessary relation to human affairs, but a relation which concerns the civil order only; and concerning such things the State is justified in making laws and giving decisions.[47]

Is that all the State has to say concerning Marriage? As to the Sacrament, this is undoubtedly all. The rest the State may confidently leave to the Church. However, we must not shut our eyes against the circumstances of the time. To-day, by reason of an almost general indifference in matters religious and the so-called parity of religion granted by the State to a hundred and more sects, nearly every State contains a large percentage of citizens who, practically at least, escape the enforcement of ecclesiastical laws. Should we, then, entirely deny to the State the power of framing marriage-laws? No, the State is deeply interested in marriage and the family and hence must assert a certain control, not only over the civil effects of marriage, but also over the contract itself, or at least its formalities. However, before we explain this power we must lay down some self-evident rules.

1. No State, whether Christian or infidel, has any right to legislate concerning Marriage as a Sacrament, for this is a purely spiritual matter. This proposition is, though

47 "*Arcanum*," Feb. 10, 1880; J. J. Wynne, S.J., *The Great Encyclical Letters of Leo XIII*, 1903, p. 78; cfr. Gasparri, *De Matrimonio*, ed. 3, n. 278; Wernz, *Ius Decretalium*, ed. 2, IV, Vol. I, p. 96 ff.; De Smet, *l. c.*, p. 292.

not *de fide,* certain and common doctrine of the Catholic Church.[48] Therefore,

2. The State is not empowered to set up impediments, either prohibitive or invalidating, with regard to Christian Marriages vested with the sacramental character. This power belongs exclusively to the Church.[49] Some [50] have distinguished between prohibitive and invalidating impediments set up by the State, but this distinction is groundless.[51] For to determine the time and circumstances proper for the reception of the Sacraments is an ecclesiastical right. Neither can an appeal to the recognition by the Church of civil laws, for instance, concerning adoption, justify this interference. These civil laws bind, not as civil, but as ecclesiastical laws acknowledged or "canonized" by the Church.

3. The State may frame laws governing the civil effects of matrimony and prescribe a civil form to be followed by the contracting parties under penalty.[52]

4. Besides, the State may for a time and for weighty reasons prohibit Marriage or its consummation, at least indirectly, *e. g.,* to soldiers.

5. But the State may never, under any condition, claim the right to enact laws that clash with the natural or the divine law, no matter whether there be question of a Marriage of baptized or unbaptized persons. For the State is not above these laws. Thus laws favoring divorce or polygamy in any shape or form are looked upon by the Church as antagonistic to the divine law and she

48 Gasparri, *l. c.,* n. 283.

49 *Instructio S. C. Prop. Fide,* 1753 (*Coll.,* n. 385).

50 Thus Schulte, *Eherecht,* 1855, p. 327.

51 The S. C. C. rejected the assertion of the provincial council of Rouen, 1855, that no one should get married ecclesiastically before evidence is given of the civil marriage; cfr. Wernz, *l. c.,* ed. 1, p. 1127.

52 Gasparri, *l. c.,* n. 288.

never fails to denounce them. Moreover, laws "regulating the *birth rate*" or affecting parties previously to marriage are unjust, because unnatural. A recent writer [53] has expressed his view of the suggestion that only the healthy shall be permitted to marry, in the following energetic language: "I am nauseated by this blithering rot about the scientific breeding of human beings as if they were cattle and hogs. The State has no right to select your wife. This privilege belongs to the realm of personal liberty where the individual is king [to a certain extent, of course]. Laws cannot impart love. Compulsion breeds rebellion." We may add another reason: As Marriage is intended and directed by nature, the author of which is God, no human power has the right to interfere with it. There is only one impediment that can prevent men or women generally from getting married, and that is absolute and incurable impotence. This is an impediment set up by nature, and no other impediment equals it.

Having said this much by way of general principles, we now proceed to determine *what rights may be claimed by the State concerning the Marriages of unbaptized persons*. When we say the *State*, we mean the authority which rules any autonomous commonwealth. Autonomy or sovereignty, however, need not be complete. Thus our American States and the cantons of Switzerland are sovereign to some extent, but not completely. In the U. S. marriage laws are made not by the Federal but by State authority. Unfortunately there is no uniformity of legislation. Whether our State legislatures may be called Christian or not, does not matter, as long as the laws they

53 Windle, *Word Pictures*, 1918, p. 48. This language is justified by the proposal of some laws to that effect in the State of Illinois. But the war has made such precautions superfluous.

make are based, to a great extent at least, on Christian principles. "Christianity is not the legal religion of the State as established by law. If it were, it would be a civil or political institution, which it is not; but this is not inconsistent with the idea that it is in fact and ever has been the religion of the people. This fact is everywhere prominent in all our civil and political history and has been from the first recognized and acted upon by the people as well as by constitutional conventions, by legislatures and by courts of justice." [54]

This much premised, we say that *the State is entitled to legislate concerning Marriages of non-baptized persons.*[55] For whatever belongs to the State, by reason of persons or matter, is subject to the State's power to make laws. And since Matrimony, as a public institution of great importance, interests the State, and the contracting parties, as citizens, are subject to it, the competency of the civil authority is evident. We need not dwell upon this argument. As to the first premise, every one will readily concede that the range of civil legislation is as wide as the end for which the State is established. This end is the temporal welfare and prosperity of men, and therefore the State must be competent in all such matters. Marriage, too, as far as it is merely a natural contract, falls in this category because it is, as St. Thomas says, a means of propagating the political society, which is maintained by family life. A family is founded by the union of a man and a woman, and this union is effected by the consent of both or the nuptial contract. Hence the civil authority is empowered to surround this contract with such safeguards as are apt to guarantee a well or-

54 K. Zollmann, *American Civil Church Law*, 1917, p. 12 f.

55 We follow here Resemans, *De Competentia Civili in Vinculum Conjugale Infidelium*, Rome, 1887.

dered and prosperous relation. But the State, no more than the Church, has the right to supply, essentially alter or abolish the mutual consent, because it is the essence of the matrimonial contract. Besides, since Marriage has been established by the Author of nature for a well-defined purpose, which precedes all human intervention, the State has no power to limit or prevent the scope of Marriage. Lastly, since indissolubility and unity of marriage are dictated at least by secondary conclusions drawn from natural law, the civil authority ought to refrain from framing contrary laws.

Another argument for our thesis may be derived from the fact that the *contracting parties are withdrawn from the sphere of ecclesiastical legislation.* As the Church has no jurisdiction over the unbaptized, either the individuals or civil society as such must regulate their Marriage. To leave this important matter in the hands of individuals is impracticable, because selfish and sensual motives would cause them to pervert the true notion of Marriage. Hence only the legitimate civil authority can impartially and equitably moderate and direct the sacred institution according to the dictates of public welfare and common exigencies.

The *extent* of the legislative power of the State over the marriages of the non-baptized has been stated at the beginning of this section. One thing should be added. We except no *impediments,* unless, of course, they clash with the natural or the positive divine law. Concerning the authentic *interpretation* of the divine law, the Code states that it lies exclusively with the supreme ecclesiastical authority [56] to determine whether it invalidates or impedes marriages. As the text here does not add, "of baptized persons," it seems to include *all* marriages.

[56] Can. 1038, § 1.

Therefore it is safe to say that authentic declarations must be expected from the Church alone. Of course, the Church will not give decisions in cases that are not brought before her tribunal. But it is not asking too much of the civil authorities that they should take cognizance of her views and laws.

Is the *thesis we defend safe to hold?* It is undoubtedly safe, because the majority of eminent canonists [57] propose and Roman decisions plainly admit it. Thus the S. C. Prop. Fide says: "Marriages of infidels must be governed by natural and civil law." [58]

This would be sufficient for the explanation of our canon. However, as we have adverted to civil laws, it may not be amiss to add a word or two about *our State laws* concerning Marriage. Broadly speaking it is safe to say that our civil laws do not interfere with the laws of the Catholic Church, if we except divorce. Polygamy is suppressed and punished, but the law is indifferent to the theological doctrine of polygamous marriage "for eternity," such as the Mormons propose.[59] For the greater part of marriage law turns about the class (race) and conditions of parties to a marriage, the prohibited degrees of kindred, the marriage license, and the duties of the solemnizing clergymen. It would exceed the limits of this commentary to cite the laws of the different States. We may refer the reader to the *Ecclesiastical Review Year Book* for 1910, and to the *Ecclesiastical Review,* Vol. 42, pp. 586 f.

57 Cavagnis, De Angelis, Gasparri, Laurin, Santi-Leitner, Wernz; cfr. Resemans, p. 54.

58 Cfr. *Coll. P. F.,* Vol. I, p. 435; n. 71; n. 744.

59 Zollmann, *l. c.,* p. 12.

BETROTHAL OR ENGAGEMENT

After determining certain preliminary questions and notions in regard to Matrimony the Code discusses the preparatory act, *i. e.,* betrothal. Note that engagement is not put under Ch. I, which treats of the things that *must* precede Marriage. This shows that it is not essential to marriage. Too much importance should not be attributed to it. A few *historical observations,* however, may not be amiss.

1. *Engagement* is a promise of marriage, the Latin term, *sponsalia,* being derived from *spondere,* to promise or to stipulate. The ancient *Greeks* employed the term *sponthai,* which originally signified drink-offerings made to the gods in the act of betrothal. The modern Greeks call them *mnesteia* instead of *progameia* or *proteleia.*[60] With the *Hebrews* a certain solemnity preparatory to Marriage was in vogue. These were the *thenaim* or *schidduchim,* which terms properly signify the promise of the parents or guardians to give the girl in marriage. The more elaborate ceremonies described by the Mishnah of Rabbi Raba,[61] are of a later date.

Engagement occupies a prominent place in the *Roman Law,*[62] from which we gather that *sponsalia* were made by consent at an age when the parties knew what they were doing. A breach of promise was severely punished in the bride, but not in the bridegroom,[63] and a second promise, if broken, entailed infamy.[64] Formerly the privilege of a lawsuit (*actio in id quod interest*) was

60 Cfr. Cironius, *Paratitla,* l. IV, tit. 1, n. 4; Milasch-Pessic, *K.-R. der abendländ. Kirche,* 1905, p. 587. Nicholas I defines sponsalia as *"futurarum nuptiarum promissa foedera"* (c. 3, C. 30, q. 5).

61 Benedict IV, *"Postremo mense,"* Feb. 28, 1747, §§ 62 ff.

62 Dig., l. 23.

63 L. 13, § 3, Dig. 48, 5.

64 L. 13, Dig. § 3, Dig. 3, 2.

granted before the judge, but later on this was prohibited.[65]

The *Germanic tribes* (Alamanni, Bavarians, Franks, Lombards, Saxons) admitted a promise made by the father or guardian of the bride, when she was delivered into the power (*mundium*) of the groom. The latter had to pay a stipulated sum and to promise to marry her. From this promise followed the obligation of loyalty and the right to punish the bride as if she were guilty of adultery. An engagement could be dissolved for leprosy, insanity, or blindness befalling the bride. If it was broken off without a just cause, a fine was imposed upon the bridegroom or the guardian of the bride.[66]

There can be no doubt that the early Christians, following the Roman law, observed a time of preparation or engagement before Marriage. The first known document touching ecclesiastical legislation on betrothal is a canon of the synod of Ancyra (314). The matter is more plainly mentioned in a letter of Pope Siricius (384–398) to Bishop Himerius, which speaks of the sacerdotal blessing accompanying the act.[67] In the eleventh or twelfth century we find an impediment called "*quasi-affinitas*" or public honesty attached to engagement. This impediment at first concerned only the bride,[68] but Innocent III extended it to the groom and to the fourth degree.[69] Boniface VIII limited this law to certain engagements excluding all spurious and conditional ones as long as the condition was not fulfilled.[70] The Council of

65 L. 15, § 24, Dig. 47, 10; Gellius, *Noctes Atticae*, l. 24, c. 4.

66 *Lex Visigoth*, III, 1, 2; III, 4, 2; III, 6, 3; *L. Roth. Longob.*, c. 179; *Lex Salica*, 12, 10; *Lex Alam. Hlothwic., Lex*, 52; *Lex Bojuv.*, 8, 16; *edict. Roth.*, cc. 179, 180, 192; *Lex Luitp.*, c. 119.

67 Coustant, *Epp. R. Pontt.*, 1721, coll. 627 f.; c. 50, C. 27, q. 2.

68 C. 3, Comp. I, IV, 1.

69 C. 5, X, IV, 2; c. 8, X, IV, 14.

70 C. un. 6°, IV, 1.

Trent restricted this impediment to the first degree.[71] Now it is abolished.

As to the *formalities* of betrothal, no law was ever universally introduced to oblige the parties to observe any special ceremonies. Spain had a peculiar law since Charles III's Pragmatic Sanction, which provided that a valid engagement had to be set down in writing.[72] This statute was at first tolerated by the Church and is now formally established as a universal law.

Can. 1017

§ 1. Matrimonii promissio sive unilateralis sive bilateralis seu sponsalitia, irrita est pro utroque foro, nisi facta fuerit per scripturam subsignatam a partibus et vel a parocho aut loci Ordinario, vel a duobus saltem testibus.

§ 2. Si utraque vel alterutra pars scribere nesciat vel nequeat, ad validitatem id in ipsa scriptura adnotetur et alius testis addatur qui cum parocho aut loci Ordinario vel duobus testibus, de quibus in § 1, scripturam subsignet.

§ 3. At ex matrimonii promissione, licet valida sit nec ulla iusta causa ab eadem implenda excuset, non datur actio ad petendam matrimonii celebrationem; datur tamen ad reparationem damnorum, si qua debeatur.

§ 1. A promise of marriage, made either by one party or by both, is void of effect in the court of conscience as well as in the external forum, unless it is made in *writing and signed by the parties* themselves *and* by the parish

71 Sess. 24, c. 3, *de ref.*

72 Benedict XIV, *De Syn. Dioeces.*, XII, 5, 1; *A. S. S.*, I, 528; XIII, 185 ff.

priest, or the diocesan Ordinary, *or* at least two witnesses.

This paragraph lays down the requisites of a valid betrothal and its consequences.

(1) The promise may be made unilaterally (by one) or bilaterally (by both). This distinction refers to contracts. A contract is an agreement between two or more persons to do or not to do a particular thing.[73] A *unilateral contract* (*pactum nudum*) is one that obliges one person only, as if James would say: "I will marry you, Gemma," without any obligation on Gemma's part to marry James. Such a contract is hardly imaginable, and the English law [74] looks upon unilateral promises of this kind, without a consideration of some sort or other, as totally void of juridical effect. Our Code, according to the views of most canonists, admits such a contract, provided it complies with the necessary requisites. The whole question is speculative rather than practical. A *bilateral contract* obliges both parties equally and belongs to the species of *contractus innominati,* more especially those called *facio ut facias,* when a man agrees to do something for another, provided the other does something for him. A marriage promise, therefore, is an agreement of future marriage between two determined persons.

(2) These *persons* are not described in our Code. But it stands to reason that they must be *capable* of making a contract, as the Gloss says: All persons who understand the nature of a contract, and are not prohibited

73 Cfr. Blackstone-Cooley, *Comment.,* II, 442; cfr., l. 1, Dig. II, 14: *"Duorum vel plurium in idem placitum consensus";* on contracts in general see X, I, 35, *de pactis,* and the commentators.

74 Herein the English law follows the Roman; but Canon Law differs from both as to the moral obligation; Engel, I, 35, n. 10.

by law, may enter upon an agreement.[75] This excludes those who are actually or habitually deprived of the use of reason or of the necessary senses, unless the latter are supplied by artificial means.[76] As to *age,* the Code determines nothing except so far as marriage itself is concerned.[77] But no restriction is made or year fixed, and hence if reason and senses are not wanting, any age is admissible. As to freedom from compulsion we refer to can. 103, which renders any act done under external compulsion, invalid. *Fear* would, according to the same canon, not render a betrothal invalid, but merely rescindable.

(3) As regards the *contract itself,* it must be an external manifestation of internal consent. Hence a frivolously or fictitiously given consent would be invalid. Such a thing is now almost excluded, and if it is not entirely excluded, the alleged motive would require strict proof.[78] The consent may be given, as formerly, by *proxy,*[79] for neither the *"Ne temere"* nor the Code excludes this mode. But the proctor would have to show his credentials and be instructed by the respective parties *ad hoc* and for a determined person.

(4) The *object of the promise* is future marriage, not the promise itself; wherefore if James and Gemma would merely intend to make the promise without any intention of marrying one another, it would be null and void. But there may be a real intention of marriage with an *impediment* blocking the way of its fulfilment; for instance, consanguinity. Is it permissible to contract an engage-

75 Ad c. 23, X, IV, 1.

76 Cfr. Wernz, *l. c.,* IV, Vol. I, p. 124, n. 93.

77 Cfr. can. 1067.

78 S. C. C., Dec. 18, 1728; March 12, 1729 (Richter, *Trid.,* p. 222); *A. S. S.,* I, 342; III, 304; VII, 667.

79 Cc. 1, 11, X, IV, 2; c. 9, 6°, I, 19; l. 2, Dig. II, 24; this extension is made from the parents to the proctor.

ment notwithstanding such an impediment? And if contracted, would it be valid? Supposing the prescribed form to have been duly observed, the answer is as follows:

(a) If the impediment is one that cannot be removed by a dispensation, the promise is both invalid and illicit, because the object of the promise being marriage, and marriage being impossible, forbidden, and therefore sinful, the promise has a sinful object and is therefore destitute of the necessary moral and juridical qualities, namely: liceity, honesty, possibility.[80]

(b) If the impediment is of a kind that may be and generally is removed by a dispensation, the nature of the promise depends on the intention of the contracting parties. If they conclude the engagement without regard to the permission to be obtained, or with the intention of forcing the authorities to grant a dispensation, their promise would be sinful and, we believe, invalid, because no one may bind himself to commit a sin. If the parties enter upon the engagement with the express condition, "provided we can obtain a dispensation," the promise is valid and the parties would be bound to apply for a dispensation and await the grant. In case of refusal, both would be free to enter a new engagement with some other party not subject to an impediment.[81] However, these hypotheses are now-a-days rather futile, because if the pastor is present, he will tell the parties to abstain from an engagement until the dispensation is obtained. The required witnesses, too, would probably be aware of the impediment and caution the parties.

80 Cfr. l. 137, Dig. 45, 2; *A. S. S.*, I, 78, 81, 121; S. C. C., Jan. 26, 1709; Dec. 12, 1733 (Richter, *Trid.*, p. 220); v. Scherer, II, 130.

81 Wernz, *l. c.*, IV, 1, p. 127 f., pays too much attention to a decision of a nameless congregation quoted by Giovine.

The same distinction applies if the *impediment* is only a *prohibitive one,* for instance, mixed religion. If the parties engage themselves *unconditionally, i. e.,* without the explicit mention of the condition, "Provided we can obtain a dispensation," or, "Provided you become converted," or, "Provided the impediment ceases," the promise is invalid, because the contract is illicit as promising a dishonorable thing.[82] But if the condition is added, the promise holds good and is licit, since the parties wish to abide by the decision of the Church and therefore, what they promise each other is not dishonorable.

If *parents* (not relatives or guardians) are, for weighty reasons, opposed to an engagement, for instance, because of danger to the faith or to the peace of the family, the promise is invalid unless made with the condition: "If the parents consent," because it violates the natural law, which dictates submission to parents in all lawful matters.[83] If the parents' opposition is unreasonable, for instance, based merely on considerations of money, social standing, or personal dislike, the promise is valid and licit.[84]

Soldiers may lawfully and licitly contract engagements during military service, for in time they may marry.

(5) The *form* of betrothal is now strictly prescribed. The engagement must be made *in writing.* And here we may add what § 2 of can. 1017 says: "*In case both parties or one of them, does not know or is unable to write, it is required for the validity of the act that this fact be noted in the document itself and another witness be added, who, together with the pastor or the Ordinary of the diocese or the other witnesses, shall sign the document.*"

82 Cfr. ll. 26 f. Dig. 45, 1; § 24, *Inst.,* III, 19; c. 8, X, I, 35.

83 Sanchez, l. IV, disp. 23, n. 11; Gasparri, *l. c.,* n. 62.

84 C. un. C. 31, q. 3; cc. 1, 4, 11, X, IV, 2.

From these two paragraphs it follows:

(a) That writing is *absolutely necessary;* but no specific form is prescribed, provided the intention is clearly manifested. And here we must return to the "*unilateral*" promise. If James wants to make a promise on his part only, without obliging Gemma to marry him, he may do so. But in that case what necessity is there for Gemma's signing her name to such an informal contract, which leaves her free to marry? So far it has generally been held that the promise of one party must be followed by the promise of the other, which was called *repromissio,*[85] because the object was marriage between two determined or designated persons.[86] Such written engagements are not likely to become popular.

(b) If both contracting parties, or one of them, does not know how, or is unable to write, a *substitute* must be employed and the fact be set down in the paper embodying the engagement. The Code adds to the decree "*Ne temere*" the words: "*vel nequeat.*" Hence the inability to write may be either intellectual (*nesciat*) or physical (*nequeat*). The one indicates illiteracy, the other may be caused by sickness, for instance, paralysis or bodily weakness. In all such cases a substitute or additional witness must be employed, who shall sign his own name, not that of the parties, and the fact must be expressly noted.

(c) Besides the contracting parties and the additional witness, where such a one is required, there must be official witnesses and private witnesses to every canonical engagement.

85 Boekhn, IV, 1, n. 53; Gasparri, *l. c.*, n. 52; the "*Ne temere*" has no such "unilateral" term.

86 S. C. C., April 14, July 13, 1725 (Richter, *Trid.*, p. 222, n. 6). If one party said "I take thee and none else," it was considered insufficient.

a) The *official witnesses* are either the pastor or the Ordinary of the diocese. The *pastor* may be anyone whom the Code describes as such.[87] It is not necessary that he be the pastor of either of the parties, as the apposition "*proprius*" is not found in the text.[88]

Delegation is not admissible either for the pastor or the Ordinary.[89]

Distinct from delegation is the office of *vicar* or assistant (*oeconomus*), *i. e.*, a priest who has entire charge of a parish *ad interim*.[90]

As to *military chaplains*, their faculties must be consulted.[91]

An assistant (*cooperator;* see can. 476), though he may have general delegation to assist at marriages, may not be official witness at a betrothal, because the interpretation given to the text excludes all delegation, hence also habitual delegation.

β) The *private witnesses*, if pastor and Ordinary are absent, must be at least *two*. Concerning the *qualities* of these witnesses nothing is said in the text, but it is evident that they must be able to write and to understand what they are doing. For the rest, it does not matter whether they are men or women or what their moral character or religious belief may be.

(d) The parties or their substitute, *i. e.*, the additional witness and the other witnesses, *i. e.*, the pastor, the Ordinary, or the two private witnesses, should sign the engagement contract in the *presence of one another*.[1] Hence they must all be present at the same time. The certificate must show the day, month, and year of the

87 Cfr. can. 451.
88 S. C. C., March 30, 1908, ad VII. Cfr. can. 334, § 2.
89 S. C. C., March 30, 1908, ad VI.
90 Can. 451, § 2, n. 2.
91 *Ibid.*, n. 3,
1 S. C. C., July 27, 1908, ad I.

engagement in order to be valid.[2] The place may conveniently be added, but is not required for validity.

6. The *effects* arising from a valid betrothment are the following:

(a) The parties are bound by a grievous obligation to *contract matrimony.* The time is left to their own prudent judgment, but it should not be unreasonably protracted.

If the engagement contract was made with the explicit stipulation of a certain date for the marriage,— *ad finiendum contractum,*— the engagement contract becomes null and void after the lapse of that time, and both parties are free. If the date is not set as a condition proper, but only in order to accelerate the fulfillment,— *ad urgendum contractum,*— the parties should get married within a reasonable time.[3] In the latter case the ecclesiastical judge may, of his own accord, determine the time within which the marriage must take place. Thus the Ordinary may appoint a term of six months on condition that if the marriage is not performed within this period, the betrothment becomes void.[4]

(b) *An engagement made with another person* whilst a former engagement is still valid, is without effect, even if made under oath.[5]

(c) A third effect is *moral.* If one of the contracting parties has carnal intercourse with a third person, the act involves a sin against justice.[6] However, since not a few moralists contradict this statement, especially concerning the groom, it is difficult to admit a change in the species of the sin.[7]

2 *Ibid.*, ad II.

3 Cfr. l. 14, Dig. 50, 17; l. 14, Dig. 45, 1; Gasparri, *l. c.*, n. 121.

4 S. C. C., Oct. 2, 1723 (Richter, *Trid.*, p. 223, n. 20).

5 *Reg. Iuris 69 in. 6°;* c. 18, X, II, 24; Boekhn, IV, 4, 1.

6 Thus Boekhn, IV, 4, n. 103; Benedict XIV, *Inst.*, 46, n. 19.

7 Thus Noldin, *De Sexto Praecepto,* 1905, p. 21.

(d) A fourth effect is the negative one mentioned in § 3 of can. 1017, which reads thus: *From the promise of marriage,* although this be valid and no just reason excuses, *no action is admissible to compel the celebration of marriage.* However, an action to recover damages is permitted. Because marriage should be freely entered upon, and forced marriages seldom have a happy issue,[8] the legislator forbids any lawsuit to be brought against the recalcitrant party. For the same reason various decisions of the Roman Congregations admonish ecclesiastical judges not to threaten unwilling parties, especially women,[9] with censures. However, if damage was done, especially in case of pregnancy or contracted illness, or if expensive preparations were made for the marriage, the party guilty of a breach of promise can be sued for an amount sufficient to cover the expenses. A *penalty* or fine added to an engagement contract for the party violating the same has no juridical effect, since such a penal sanction would be unlawful.[10] Small presents[11] given on the occasion of an engagement may be either reclaimed or condoned.

Note that all these effects follow only betrothments made in writing, as prescribed by the Code. No other form of engagement, no matter how pompously celebrated, produces any of these effects, either before the tribunal of the ecclesiastical judge, or in the court of conscience. Hence confessors have no right to oblige anyone to anything arising from a broken informal engagement, though it goes without saying that a man who has damaged a young lady's reputation by undue famili-

8 Cc. 2, 17, X, IV, 1.

9 S. C. C., March 30, 1748 (Richter, *Trid.*, p. 223, n. 18); S. C. P. F., Nov. 22, 1790 (*Coll.* n. 603).

10 See the gloss on c. 29, X, IV, 1 *s. v.* "gemma"; Sanchez, IV, 1, 140.

11 *Arrhae,* from the Hebrew *arab,* or Greek *arrabon, i.e.,* pawn, are given as a token and proof of engagement; Forcellini, *Lexicon, s. v.*

arities is bound in conscience to make restitution, or if no remedy can heal the damage, to marry her. This obligation arises not from the betrothal, but from the natural law and has nothing to do with the form of engagement. If a valid engagement has preceded a breach, caused, for instance, by a marriage with another person, the *competent judge* to decide in a damage suit is either the ecclesiastical or the civil court. But a lawsuit for recovery of damages does not suspend the marriage with another, neither has it any effect on the merits of the cause that brought about the breach and the new marriage. In other words, the suit must be strictly limited to the recovery of damages sustained by the breach of a legally valid betrothal.

To this authentic interpretation a remark must be added. The Code has abolished the impediments which formerly followed valid betrothal. Hence no prohibitive or invalidating impediment,— public honesty (can. 1078), — arises even from a valid engagement. It was but natural that a doubt should arise as to the retroactive force of the Code (can. 10) with regard to impediments contracted before the new law went into effect. The papal Commission for the Authentic Interpretation of the Code [12] has decided that no retroactive force must be attributed to the Code concerning betrothal and marriage, but that both are governed by the present law when they are already contracted or shall be contracted, excepting only the action mentioned in can. 1017, § 3. This means in plain English that a betrothal, though made before May 19, 1918, produces no impediment to a marriage contracted after that date. Therefore James, validly engaged to Gemma before said date, may marry her sister, daughter, or mother without any dispensation.

12 June 2–3, 1918 (*A. Ap. S.*, X, 345).

Our *civil laws* do not differ much in this point from the ecclesiastical law. Thus the different States of the Union acknowledge no strict obligation of marriage, nor do they grant legal action on account of a betrothal, but allow the party suffering from a breach of promise to bring a damage suit.[13] In England, 26 Geo. II, c. 33 enacts that no suit shall be heard in any ecclesiastical court to compel a celebration of marriage *in facie ecclesiae* for or because of any contract of matrimony whatsoever.[14]

7. *Dissolution of Engagements.* "For the cancelling of an engagement contract," says a recent commentator [15] on the decree "*Ne temere,*" "no new rules have been made in this decree. The reasons, therefore, heretofore commonly held to be sufficient by moralists and canonists will suffice also now for the breaking of the engagement contract." This remains true after the promulgation of the Code, because no special provisions are made to that effect. Neither does Bk. IV mention betrothal in treating of marriage procedure, nor is it touched in the chapter on dispensations. All this is but the logical consequence of the present legislation, which has removed all impediments that formerly arose from valid betrothal. The reasons proposed by canonists as permitting the solution of an engagement were briefly these:

(a) An engagement may be cancelled by *mutual consent* according to the *Regula Iuris:* "By whatever causes a thing is produced, it may be dissolved by the same." [16] Thus engagements made by *impuberes* may be cancelled by them after they have reached the age of puberty, even though made under oath.[17]

13 Bishop, *New Commentaries on Marriage,* 1891, I, § 226 f.

14 Blackstone-Cooley, *l. c.,* III, 94.

15 S. Woywod, *Marriage Laws,* 1913, p. 9.

16 *Reg. Iuris in 5°* (c. 1, X, V, 41).

17 Cc. 7, 10, X, IV, 2.

(b) An engagement is cancelled *by marriage with another.* Thus if James, after having been engaged to Gemma, marries her sister, the prior engagement is broken, and Gemma is free to marry another. Nor does that obligation ever revive,[18] especially now, since there is no impediment attached to betrothal, it seems but natural that the obligation should cease altogether after the marriage.

(c) An engagement is cancelled if one of the parties *embraces the religious state,* or rather makes profession, for the latter act implies the religious state. Formerly religious profession and solemn vows were considered equal, and older canonists, like Panormitanus[19] and Sanchez,[20] attributed the power of cancelling a betrothal only to solemn, not to simple, vows. However, the present tendency and the view sustained by our Code favors equalization of religious vows on that point. The Code[21] makes the act of embracing the religious state a prohibitive impediment without distinction. Hence it is safe to say that if both parties would make religious profession, the engagement would be dissolved. It is also certain that if one of the parties makes solemn profession, the betrothal is dissolved.[22] Finally, the present practice of the Church favors the view that even temporary profession, made in either a papal or diocesan institute, cancels a marital engagement. For every engagement is understood to contain the implied condition: "Unless I choose a more perfect state."[23] The religious state, honored and distinguished by the Church, enjoys the favor of law and preference. Of course, a resulting damage

18 Thus Sanchez, v. Scherer, Wernz, etc., whose views are, theoretically speaking, the only correct and moral ones.

19 Ad c. 5, X, 6, n. 6.

20 *De Mat.*, I, disp. 46 f.

21 Can. 1058.

22 Cc. 2, 7, X, III, 33.

23 Wernz, IV, 1, n. 113, note 118.

suit would have to be settled either peaceably or in court.

(d) An engagement may be cancelled *for personal reasons.* A valid personal reason would be, (α) If one of the engaged persons would *absent* himself from the other for a long time without giving notice.[24] (β) If the *moral character* of one of the parties has considerably deteriorated. Hence, any attempt at making another engagement or having sexual intercourse with a third person would justify the innocent party in withdrawing from the engagement. Sexual intercourse with another than the engaged person, made known only after the engagement, but had before it, is a sufficient reason for breaking the contract,[25] unless it has been condoned. If both parties have committed fornication either before or after their engagement, and no pardon has been given, both may recede from the engagement.[26] A considerable *deterioration in character* would take place if one became a spendthrift or drunkard, or had to face an accusation in a criminal court.[27] (γ) If *a physical or mental change* has taken place in both or either of the engaged persons. Mental derangement, especially if incurable, or a contagious and lasting sickness, or a noticeable deformity of the body, would be a sufficient cause for breaking an engagement.[28] (δ) If a *change of fortune* or *social condition* should occur in one of the parties, the other would have reason to withdraw from the engagement. Thus if a poor fellow or girl should receive a rich legacy or bequest, or if a social or political or commercial event would raise him

24 C. 5, X, IV, 1.

25 Boekhn, IV, 1, n. 150: *"paria sunt in iure nunc scire et nunc esse."*

26 Cc. 6, 7, X, IV, 16; v. Scherer, II, p. 134.

27 S. C. C., Nov. 14, 1725 (Zamboni, *Coll.*, n. 17, *s. v.* *"Sponsalia"*); S. C. C., May 29, 1852 (Lingen-Reuss, *Causae Selectae*, 1871, pp. 881 f.).

28 S. C. C., May 14, 1729 (Zamboni, *l. c.*, n. 20); c. 25, X, II, 14.

to "higher" social rank, there might be a reason for breaking the engagement, not only on the advantaged side, but on both. For too great disparity in fortune and social position often causes marriages to be unhappy.[29]

(e) Finally, *family reasons* may render the dissolution of an engagement advisable, *e. g.*, if serious enmities, hatred, dissension, aversion are apt to result from the contemplated marriage, as is sometimes the case in feudally inclined nations and countries. The S. C. of the Council has repeatedly cancelled engagements for this reason. Another cause would be strong parental opposition, but not in all instances, even if threats of disinheritance are employed.[30]

Whether engaged parties are *obliged to manifest to each other their secret defects* is a debated question. Justice certainly obliges one to reveal such defects as would prove very injurious to the other, for instance, pregnancy, contagious disease, etc.[31] Concerning *juridical procedure* nothing need be added, since the ecclesiastical courts would hardly occupy themselves with a damage suit, or if they did, would decide it summarily.[32]

Can. 1018

INSTRUCTIONS ON MARRIAGE

Parochus ne omittat populum prudenter erudire de matrimonii sacramento eiusque impedimentis.

Before turning to the chapter on immediate preparations for marriage, the Code exhorts pastors to instruct

29 Wernz, *l. c.*, IV, 1, n. 116.

30 S. C. C., Feb. 28, 1733; Nov. 29, 1783; July 31, 1728 (Zamboni, *l. c.*, nn. 28, 41, 23).

31 De Smet, *l. c.*, p. 25 f.

32 The Roman Pontiff, and he alone, may dissolve engagements; but they are hardly ever brought before him.

their people on the Sacrament of Marriage and its impediments. It does not say how often such instructions should be given or on what occasions. Instructions may be public or private.

(a) *Public instructions* (given, for instance, on the second Sunday after Epiphany) should be couched in general terms and deal with the nature and dignity of the Sacrament, the duties of the married towards each other and their children, and their respective rights. Leo XIII, addressing chiefly the bishops, says: "Let special care be taken that the people be well instructed in the precepts of Christian wisdom, so that they may always remember that marriage was not instituted by the will of man, but, from the very beginning, by the authority and command of God; that it does not admit of a plurality of wives or husbands; that Christ, the author of the New Covenant, raised marriage from a rite of nature to a Sacrament, and gave to His Church legislative and judicial power with regard to the bond of union." [33] The evil of divorce, illustrated by statistics, may also form a topic of public instruction.

(b) *Private instructions* should be given to those who are about to enter the married state by the *pastor,* along the lines laid down in Pastoral Theology and in the canons which immediately follow the present one. The *confessor,* too, may, if he is asked or finds that the parties are ignorant, instruct them on the lawfulness and the obligations of marriage. He may tell them that everything is permitted that is conducive to the end and purpose of Matrimony, and that, generally speaking, sins against chastity among married people are not grievous, unless illicit means are employed.[34]

[33] "*Arcanum,*" Feb. 10, 1880, ed. Wynne, *l. c.,* p. 79 f.
[34] Cfr. De Smet, *l. c.,* p. 461.

CHAPTER I

ON THE PRELIMINARIES OF MATRIMONY AND ESPECIALLY THE BANNS

This chapter deals with certain preparatory acts, especially the examination of the candidates and the proclamation of the banns.

CAN. 1019

§ 1. Antequam matrimonium celebretur, constare debet nihil eius validae ac licitae celebrationi obsistere.

§ 2. In periculo mortis, si aliae probationes haberi nequeant, sufficit, nisi contraria adsint indicia, affirmatio iurata contrahentium, se baptizatos fuisse et nullo detineri impedimento.

Before a marriage may be celebrated, certainty must be had as to whether there exists an obstacle to its validity or liceity, for, as will be explained further on, a Marriage may be contracted validly, yet unlawfully, because prohibited by the Church. From this the distinction between prohibitive and invalidating impediments appears. Pastors are sometimes called to a sickbed, or rather deathbed (*periculo mortis*), to "straighten out" a marriage. The couple is alone, without witnesses and papers, perhaps strangers in a far off country; what is to be done? When there is danger of death, and no other proof can be procured, and signs do not point to the contrary, the sworn statement of the parties that they are

baptized and suffer from no impediment will suffice to admit them to the celebration of marriage. Note the requirement of *baptism,* which is not further determined, wherefore valid, nay presumably valid, Baptism suffices. Of course, if the parties should wish to be baptized conditionally, this would settle the first requisite. But the time may be very precious. We believe that, if possible, a witness should be called to hear their sworn testimony.

THE BRIDAL EXAMINATION (EXAMEN SPONSORUM)

After having glanced at the quotations in Cardinal Gasparri's edition of the Code and searched for the instructions which were said to be universal law by some authors,[1] we were surprised not to find any reference to those which emanated from Rome in 1658, 1665, and especially 1670. The last-named instruction is a rather extensive document.[2] Traces of such questioning may be found in a *Capitulare Regum Francorum* and allusions to it in Gratian's *Decretum* and the Decretals.[3] But of a previously existing universal law we could discover nothing. The Code now prescribes such an examination in

CAN. 1020

§ 1. Parochus cui ius est assistendi matrimonio, opportuno antea tempore, diligenter investiget num matrimonio contrahendo aliquid obstet.

§ 2. Tum sponsum tum sponsam etiam seorsum et caute interroget num aliquo detineantur impedimento, an consensum libere, praesertim mulier, praestent, et

1 Cfr. Wernz, *l. c.,* IV, 1 ed., p. 189.

2 *Collect. P. F.,* I, n. 192.

3 Cap. 35; also in the *Liber Canonum,* Cod. Vat. 1339, fol. 254, l. V, c. 4; c. 13, C. 32, q. 6; c. 19, C. 35, q. 2 and 3; c. 3, X, IV, 3 (Lat. Counc. IV); v. Scherer, *l. c.,* II, p. 145.

an in doctrina christiana sufficienter instructi sint, nisi ob personarum qualitatem haec ultima interrogatio inutilis appareat.

§ 3. Ordinarii loci est peculiares normas pro huiusmodi parochi investigatione dare.

§ 1. The pastor who is entitled to assist at a marriage shall, at a convenient time, carefully investigate whether there is an obstacle to the marriage to be contracted. He may delegate another, for instance, his assistant, to make this investigation. But the personal obligation remains, insofar as negligence on the part of the delegate would recoil on the pastor. If the parties belong to his parish, the parochial books should be consulted and relatives who know the parties asked. If the parties are strangers, the investigation is more difficult, but should be conducted by means of a friendly correspondence between the pastors. Here the value of properly kept registers appears. Of course, if the pastor is certain as to the perfect freedom of the parties from impediments, no investigation is necessary; in the case of an elopement or a hurried marriage, it is often impossible. This is the previous and, we might say, *informal investigation.*

§ 2. At a fixed date follows the *examination proper.* The pastor who is entitled to assist at the marriage, should question the bridegroom and bride separately and cautiously as to the possible existence of an impediment, ascertain whether both, especially the woman, consent freely to the marriage, and whether they are sufficiently instructed in Christian Doctrine. The last question may be omitted where the character and standing of the parties renders it useless.

The formal examination has two parts: the juridical questioning and the doctrinal examination. If we say

juridical questioning, this term must be understood as far as it relates to the juridically free status. Benedict XIV in his "*Nimiam licentiam,*" May 18, 1743, from which our text is almost verbally taken, says: "*seorsim caute et, ut dicitur, ad aurem explorare,*" that is to say, in a very cautious and strictly private and secret way. The reason is obvious: the matter is of a delicate nature and therefore requires prudence. Unnecessary questioning, especially about illicit familiarities, might lead to serious consequences, and the parties might make use of it in order to get a dispensation more readily. Benedict XIV (*l. c.*) advises pastors to ask whether there be an impediment, and if so, of what kind, whether there was a former engagement (this is no longer absolutely necessary), and whether the parents consent to the proposed marriage. About defamatory impediments, such as crime or public honesty, the pastor should inquire by way of instruction rather than by direct questioning, or he may omit this point entirely.[4]

The *doctrinal examination* should be held to ascertain whether the parties are sufficiently instructed concerning the commandments of God and of the Church, the Apostles' Creed, the "Our Father," "Hail Mary," the acts of faith, hope and charity, and contrition.[5] However, says the Code,— and this is a mitigation of the former practice,[6]— if the pastor knows that questioning would be useless, he may omit it with a certain class of persons. What is meant by *personarum qualitas?* Such qualities may be of the laudable sort, for instance, in the case of a well-educated layman who is a prominent Catholic, or who has written books which prove his doctrinal sound-

4 De Smet, *l. c.*, p. 453 f.

5 *Rituale Romanum,* tit. VII, c. 1, n. 1.

6 Benedict XIV, "*Etsi minime,*" Feb. 7, 1742, § 11; *De Syn. Dioec.,* VII, 14, 3–6.

ness, or of a lady who has taught Sunday School in a Catholic parish, or who is regular in attending the sermons and catechetical instructions, etc. But there is another class of persons who have barely a smack of Christian doctrine. These, says the authentic interpretation,[7] the pastor should diligently instruct, at least in the elements of Christian doctrine (as set forth above), but if they refuse to be taught, he may nevertheless admit them to marriage, in accordance with can. 1066.

§ 3. It is the business of the diocesan Ordinary to issue special regulations to pastors on the instruction of nupturients. This may be done in an appendix to the "Diocesan Statutes," unless the Ordinary himself wishes to compose or recommend a manual for the purpose.

The S. Poenit., Sept. 5, 1899, says that, besides the witnesses, the parties themselves may be asked as to the existence of impediments.

CAN. 1021

§ 1. Nisi baptismus collatus fuerit in ipso suo territorio, parochus exigat baptismi testimonium ab utraque parte, vel a parte tantum catholica, si agatur de matrimonio contrahendo cum dispensatione ab impedimento disparitatis cultus.

§ 2. Catholici qui sacramentum confirmationis nondum receperunt, illud, antequam ad matrimonium admittantur, recipiant, si id possint sine gravi incommodo.

§ 1. Unless Baptism was conferred in his own parish, the pastor must demand a *baptismal certificate* from both parties, or from the Catholic party only if the marriage

7 June 2–3, 1918, n. 3 (*A. Ap. S.*, X, p. 345).

is to be contracted with a dispensation from the impediment of disparity of worship.

The S. C. Sac. had previously insisted on such a certificate whenever one or both of the parties were baptized outside the parish whose pastor was to assist at the ceremony.[8] If they were baptized in his own parish, he should look up the baptismal record.

§ 2 is new because it demands the reception of *Confirmation* before marriage, provided this Sacrament can be received conveniently. The reason for this regulation consists in the sacramental grace of Confirmation, which strengthens the faith and enriches the state of grace.

THE BANNS

The fourth Lateran Council[9] alludes to a custom prevailing in some places, of publicly proclaiming an intended marriage. This custom was observed in Italy and France.[10] Odo of Soliac is said to have introduced it into the latter country about the year 1198. The Council of Trent prescribed a threefold publication of the banns.[11] The Code determines by whom, when, and where the publication is to be made, the obligation of the faithful to reveal existing impediments, and finally the required dispensations.

CAN. 1022

Publice a parocho denuntietur inter quosnam matrimonium sit contrahendum.

8 S. C. Sacr., March 6, 1911, ad I (*A. Ap. S.*, III, 102).

9 C. 3, X, IV, 3. Banns is from *bannum*, a public edict or proclamation; Du Cange, *Glossarium, s. v.*; *Cath. Encyl.*, Vol. II, *s. v.*

10 v. Scherer, *l. c.*, II, 146.

11 Sess. 24, c. 1; *"Tametsi," de ref. mat.*

The pastor must publicly announce between whom a marriage is to be contracted.

Stress is laid on *publicly*. A public announcement means one that can be understood by the hearers. Therefore it should be made with an audible voice, distinctly, and in the vernacular language. *Inter quos* signifies the parties between whom the marriage is to take place. The baptismal (and also any colloquial) name, the family name, the condition of the parties, whether married before or not and the number of publications must be stated. The age or social condition of the parties need not be stated, and injurious or ludicrous remarks must be omitted.[12]

CAN. 1023

PUBLICATION TO BE MADE BY THE PASTOR

§ 1. Matrimoniorum publicationes fieri debent a parocho proprio.

§ 2. Si pars alio in loco per sex menses commorata sit post adeptam pubertatem, parochus rem exponat Ordinario, qui pro sua prudentia vel publicationes inibi faciendas exigat, vel alias probationes seu coniecturas super status libertate colligendas praescribat.

§ 3. Si aliqua sit suspicio de contracto impedimento, parochus etiam pro breviore commoratione consulat Ordinarium, qui matrimonium ne permittat, nisi prius suspicio, ad normam § 2, removeatur.

§ 1. The publication of the banns is to be made by the parties' own pastor (*parochus proprius*), *i. e.*, the pastor in whose parish the parties have their domicile or quasi-domicile. Even a diocesan domicile or quasi-domicile renders a *parochus* the *proprius* of the parties who actually

12 *Rituale Rom.*, tit. VII, c. 1, n. 7; De Smet, *l. c.*, p. 42 f.

reside in his parish at that very moment. But the question naturally arises: Is a pastor *parochus proprius* of those who have been only one month in his parish? Can. 1097 allows him to assist at the marriage, and hence it would seem that he should also be entitled to publish the banns. Yet we cannot adopt this view[13] because the law itself as well as a decision of the S. Congregation of the Council[14] restricts the monthly stay precisely in regard to the celebration of marriage. Besides, the purpose of the law, which is to discover possible impediments, can scarcely be attained by proclaiming the banns in a place where the parties have resided only for one month. Lastly, the Code itself manifestly favors our interpretation, because in § 2 of our canon it speaks of a six months' stay in another place. Therefore, with regard to the banns only domicile and quasi-domicile[15] are to be considered. Now it may happen that James has his domicile in one parish, and Gemma in another. In that case the banns must be published in both parishes. The same rule holds concerning quasi-domicile. We may even stretch the possibilities. If James has a winter and a summer domicile, and Gemma also has two domiciles different from those of James, the banns must be published in all four parishes. Also, if James has a domicile and Gemma only a quasi-domicile, both in different parishes, the banns must be published in both. As to *vagi,* or vagabonds, the pastor of the parish in which they live here and now, must make the announcement.

But what if they have *recently left* their domicile or quasi-domicile? This question is answered in § 2. If a

13 Vermeersch, *De Forma Spons. et Mat.*, n. 59.

14 S. C. C., March 28, 1908 ad V.

15 Cfr. can. 92, Vol. II, p. 14 f., of this Commentary.

party has lived in *a place other than the parish of the parochus proprius* for *six months* after the age of puberty, the pastor shall report the matter to the Ordinary, who may prudently order either the banns to be published in that place or else proofs or conjectures to be gathered which establish the party's free status.

§ 3. If the pastor suspects the existence of an impediment, he should report to the Ordinary, even though the party has lived less than six months in the other place, and the Ordinary shall not give permission to marry until the suspicion has been removed by the means mentioned in the preceding paragraph (§ 2).

The question concerning a recently abandoned domicile is *touched* at least indirectly. For *alius locus,* the other place, plainly has reference to a change of domicile or quasi-domicile.[16] Therefore the Ordinary's decision must be sought, and he should make inquiries through the respective chanceries and from the pastors and also the civil magistrates, if possible. *Conjectures* would be probable indications, for instance, from travels or sojourns, as also from the moral character of the party. After he is morally certain the parties are free, the Ordinary may either order the banns to be published or instruct the pastor to proceed with the marriage ceremony. Hence it might happen that the banns would have to be published in several places, if the bishop insisted.

How is *pubertas* to be understood? We believe it is the age as stated[17] under can. 88, *viz.,* fourteen for boys and twelve for girls, since *pubertas* is to be taken in the sense defined by said canon, whereas

16 Benedict XIV, *"Paucis abhinc,"* March 19, 1758. The Holy Office, Aug. 22, 1890, ordered that the banns be published in the place of birth, and in every place where the parties lived for ten months after having reached the age required for marriage (*Coll. P. F.,* n. 1376).

17 This appears more in conformity with the text.

can. 1067 is to be strictly limited to the marriageable age.

Concerning *soldiers* we have not seen the faculties granted to our *Episcopus Castrensis*. In the camps, as a rule, the banns would have to be proclaimed by the pastor in whose parish the camp or barracks are located and by the pastor of the bride. In some countries [18] it is the office of the military chaplain to proclaim the banns of soldiers.

In addition to what we have said about the six months in another place, an authentic interpretation has been issued concerning a stay of that length of time in very distant and remote parts (*in longissimis et dissitis oris*), probably on account of soldiers and legionaries or colonial troops.[19] The answer is that in such cases the Ordinary may content himself with the oath of the party and the statement of two witnesses, or at least one, who has lived with the party, though other proofs may also be demanded.

Can. 1024

TIME AND PLACE OF PUBLICATION

Publicationes fiant tribus continuis diebus dominicis aliisque festis de praecepto in ecclesia inter Missarum sollemnia, aut inter alia divina officia ad quae populus frequens accedat.

The banns are to be proclaimed in church on three successive Sundays or holydays of obligation during the solemnity of the Mass or at other services which are frequented by the people.

18 Thus in Austria; cfr. Aichner, *l. c.*, § 164.

19 *Pont. Com. Auth. Int.*, June 2–3, 1918 (*A. Ap. S.*, X, 345).

Can. 1025

Potest loci Ordinarius pro suo territorio publicationibus substituere publicam, ad valvas ecclesiae paroecialis, aliusve ecclesiae, affixionem nominum contrahentium per spatium saltem octo dierum, ita tamen ut, hoc spatio, duo dies festi de praecepto comprehendantur.

The Ordinary may, however, substitute for said publication the public posting of the names of the contracting parties at the doors of the parish church or some other church; the announcement must remain posted for eight days, including two holydays of obligation.

(a) The *Sundays and holydays of obligation* are those celebrated *in foro externo* by the hearing of Mass and abstaining from servile labor.[20] It matters nothing whether these feast-days fall within the prohibited time, for the publication of banns is not forbidden during that period.

They are *successive* if one follows another without interruption through another Sunday. If, for instance, Christmas immediately follows Sunday, the publication is to be made on these days as they follow each other. But an interruption by ferial days is not only allowed, but even desirable.[21]

In church (*in ecclesia*) says the text, following the Tridentine Council, which intended first and above all the parish church. Hence the publications may not be made in a public or semi-public oratory. However, if a public oratory serves as a temporary church for the people, the

20 In the U. S. the holydays of obligation are: Immac. Conc. B. M. V.; Christmas, New Year, Ascension, Assumption (Aug. 15), and All Saints.

21 S. C. C., June 17, 1780 (Richter, *Trid.*, p. 225); Gasparri, n. 213.

banns may be published there.[22] Semi-public oratories are not churches.[23]

The term *missarum sollemnia* is also taken from the Council of Trent and implies, not precisely a solemn High Mass or *Missa Cantata,* but such a one as is generally regarded as a conventual or parochial Mass. The law now permits, as a rule and not only in exceptional cases,[24] that the banns be published at services other than the Mass, provided they be well attended by the people, *e. g.,* at Vespers or evening service if there is a large gathering on these occasions. This will be a welcome opportunity, especially if the last publication has been forgotten.

Can. 1025, permitting the *posting of the banns* at the church-door, is new, although the practice had been previously permitted, not, however, as a substitute, but as an additional mode of publication.[25]

Can. 1026

Publicationes ne fiant pro matrimoniis quae contrahuntur cum dispensatione ab impedimento disparitatis cultus aut mixtae religionis, nisi loci Ordinarius pro sua prudentia, remoto scandalo, eas permittere opportunum duxerit, dummodo apostolica dispensatio praecesserit et mentio omittatur religionis partis non catholicae.

The publication of the banns is to be omitted in marriages contracted with a dispensation from either dis-

22 S. C. C., 1901 (*Anal. Eccl.,* 1901, p. 58); this, however, is a particular decision not to be generalized; it was a case of church repairs.

23 S. C. C., Aug. 19, 1702 (Zamboni, *l. c., s. v. Mat.,* § VI, n. 6).

24 S. C. C., Oct. 25, 1586 (Richter, *Trid.,* p. 226, n. 30).

25 *Coll. Lac. Conc.,* t. I, 198; v. Scherer, II, 147.

parity of cult or mixed religion, unless the Ordinary discreetly permits it, provided no scandal is given, and provided that the apostolic dispensation has been obtained, and no allusion is made to the non-Catholic party's religion. Apostolic dispensation is here to be understood of the dispensation from the impediment of worship or mixed religion.

Scandal might arise among the people because of the non-Catholic party's aversion to the Catholic religion, or because of a Catholic's marrying a non-Catholic, especially in preponderantly Catholic parishes.

CAN. 1027

OBLIGATION OF THE FAITHFUL TO DIVULGE IMPEDIMENTS

Omnes fideles tenentur impedimenta, si qua norint, parocho aut loci Ordinario, ante matrimonii celebrationem, revelare.

All the faithful are bound in conscience to reveal, either to the pastor or to the bishop, any impediment they may have knowledge of, before the celebration of the marriage.

As the parish priest could not be absolved from grievous guilt were he to omit the publication of the banns,[26] so the faithful are under a grave obligation to manifest impediments known to them.[27] This obligation is based, if not on positive law,[28] at least on the nature and scope of the publication, and consequently on the public welfare, and therefore obliges *all* Catholics. Consequently

26 Benedict XIV, *"Paucis abhinc,"* March 19, 1758: *"Non idcirco denuntiationum omissionem gravi culpa carere."*

27 *Rituale Rom.*, tit. VII, c. 1.

28 Gasparri, n. 221. Wernz, IV, p. 204 (1 ed.), assumes a positive law besides the natural obligation.

all are included, none is excluded, as the Gloss says.[29] The only persons exempt from this general obligation are those bound by professional or privileged secrecy, such as confessors, physicians lawyers, counsellors, midwives. If one knows of an impediment but under secret which he has promised to keep, perhaps under oath, he would nevertheless be bound to divulge it, unless by doing so he would incur great danger to his soul or body, or give scandal.[30] But if the impediment is notorious, it may and must be manifested by anyone who has knowledge of it (except the confessor), even those who are bound by secrecy.[31] If the pastor has extra-sacramental knowledge of what he believes to be an impediment, he must stop the publication of the banns until he has convinced himself that no impediment exists.[32]

Can. 1028

Dispensation from the Banns

§ 1. Loci Ordinarius proprius pro suo prudenti iudicio potest ex legitima causa a publicationibus etiam in aliena dioecesi faciendis dispensare.

§ 2. Si plures sint Ordinarii proprii, ille ius habet dispensandi, in cuius dioecesi matrimonium celebratur; quod si matrimonium extra proprias ineatur dioeceses, quilibet Ordinarius proprius dispensare potest.

The diocesan Ordinary may, according to his discretion, dispense from the publication of the banns in his own diocese or in a strange diocese, provided there is a lawful reason. If the parties belong to different dio-

29 Ad c. 3, X, IV, 3, *s. v.* "*voluerit.*"

30 Lehmkuhl, *Theol. Moral.*, II, n. 677.

31 Gasparri, n. 226.

32 C. 27, X, IV, 1; v. Scherer, II, 148.

ceses the bishop in whose diocese the marriage is to be celebrated, is entitled to dispense; if the marriage takes place in neither of the two dioceses, either of the Ordinaries may dispense. The Council of Trent[33] left it to the prudent judgment of the Ordinary to dispense, if he sees fit, from some or all of the banns. By *Ordinary* is understood the bishop, the vicar-general, or the vicar-capitular, even without a special commission (*administrator* and *abbas nullius*). But inferior clergymen, such as deans, *pastors,*[34] or assistants have no power to grant a dispensation. However, in case a marriage would surprise a pastor, as it were, and he is aware that it could be maliciously hindered, and certain that no impediment exists, he may omit the publication, *vi declarationis,* if no time is left for consulting the bishop. This holds especially in danger of death.[35]

The Code also mentions *causa legitima.* Such a lawful reason, in general, is one which neutralizes or counterbalances the law. When a law has a penal sanction attached, this indicates that it is considered important by the lawgiver. Still more is this the case with a *lex plus quam perfecta* or one with a nullifying sanction. Less serious is a law which has neither. To this last-mentioned class belongs the omission or dispensation of the banns, because neither is nullity of the marriage nor any other penalty pronounced in the Code. The Code simply states that there should be a legitimate reason.[36] Such a reason would be, for instance, a suspicion that the marriage would be maliciously impeded if the banns

33 Sess. 24, c. 1, *de ref. mat.*

34 S. C. C., Jan. 25, March 26, 1707 (Gallemart, *Trid.*, I, 282); the pastor is not allowed to omit the publications, even if he deems them entirely useless or thinks those made by civil authority to be sufficient; S. O., Jan. 12, 1881 (*Coll. P. F.*, n. 1545).

35 De Smet. *l. c.*, ed. 1, p. 42.

36 Stricter Benedict XIV, *"Satis nobis,"* Nov. 17, 1741; "inevitable reason"; Id., *De Syn. Dioec.*, XII, 6, 2.

were published;[37] or if it appeared probable that the other party would break the engagement because of a protracted delay caused by the publication, or if disparity of age or unequal social condition, or inequality of wealth would make the parties a laughing-stock, or if the woman would be *enceinte*.

The Ordinary who may dispense is he in whose diocese both contracting parties have their domicile or quasi-domicile, or, if they are *vagi,* the Ordinary in whose diocese they happen to live at the time. Thus, if James belongs to the diocese of St. Joseph, and Gemma to the diocese of Kansas City, the bishop of the latter diocese dispenses if the marriage takes place in that diocese; because ordinarily the bridegroom follows the bride in this matter. Should James insist on being married in the diocese of St. Joseph, the bishop of that diocese dispenses. Should the parties choose a third diocese for their marriage, for instance, the archdiocese of St. Louis, either the bishop of St. Joseph or the bishop of Kansas City may dispense. No preference is here accorded to the bride. But the pastors of both parties must be notified of the granting of the dispensation (from the proclamation of the banns) by either bishop, and the episcopal chancery from which the dispensation emanates should give notice to the other, to prevent misgiving or suspicion on the part of the pastor in the other diocese.

Finally it may not be useless to add that, though no penalties are specified in the Code for the omission of the banns, the Ordinary would not exceed his power if he proceeded against pastors carelessly omitting the banns or assisting at marriages for which the banns have not been proclaimed. This right belongs to the bishop as guardian of the law, as Fagnani says.[38]

37 Gasparri, *l. c.*, n. 232 ff. 38 Ad c. 25, X, v. 1, n. 78.

Can. 1029

Si alius parochus investigationem aut publicationes peregerit, de harum exitu statim per authenticum documentum certiorem reddat parochum, qui matrimonio assistere debet.

Should it happen that another pastor has attended to the examination of the candidates or made the publications, he must as soon as possible authentically inform the pastor who is to assist at the marriage of the results of his inquiry.

Thus, Father Luke of a parish in the St. Joseph diocese has made the publications or conducted the examination of the contracting parties James and Gemma, or perhaps only of the former, who is his parishioner, but the marriage is to take place in Father John's parish in the diocese of Kansas City (or in the same diocese of St. Joseph, because the case remains the same). Father Luke discovered no impediment, but is nevertheless bound to notify Father John because the text simply says, *de harum exitu, i. e.,* he should advise him of the result obtained by either the examination or the publication, no matter whether that result was positive or negative, *i. e.,* no matter whether an impediment was discovered or not. Benedict XIV says [39] that the pastor who assists at marriage must ask whether the publications were duly made, and hence the pastor who published the banns is bound to inform his colleague of the fact. Of course, this obligation becomes more urgent if pastor Luke has discovered an impediment.[40] The Code imposes both investigation and

39 *"Paucis abhinc,"* March 19, 1758 (*Bull.,* Prati, IV, p. 494): *"ad hoc, ut tuto interesse possit matrimonio."*

40 This is the case mentioned in the instruction of S. C. Sacr., March 6, 1911, ad II (*A. Ap. S.,* III, 102).

examination, and it may happen that one pastor performs the examination, while another publishes the banns, and a third assists at the marriage. In such a case the first two have to inform the third of the result of the investigation and publication before he may assist at the ceremony.

This information must be given by means of an *authentic document.* Can. 470, § 4, prescribes that every pastor should have a parish seal for official papers. The *Rituale Romanum* [41] distinguishes two cases: (a) if both parishes lie within the *same diocese,* Father Luke has simply to send his information under the parish seal and with his signature to Father John, who must file it and make a note of it in the Matrimonial Book, as prescribed by said *Rituale Romanum.* (b) If one of the contracting parties belongs to *another diocese,* where the banns must also be published, the mere statement of the pastor that the publications were made, is of no value, unless the paper containing the statement is signed and sealed by his bishop or vicar-general and recognized by the bishop or vicar-general in whose diocese the marriage is to take place and who must give his permission for the marriage. Therefore pastor Luke of the St. Joseph diocese must send the statement to his own bishop or vicar-general, who shall forward it, signed and sealed, to the bishop or vicar-general of the Kansas City diocese, who in turn shall transmit the paper together with his own permission to Father John. If the bishop has a chancellor to whom he wishes to entrust the matter, he may do so, because what a bishop may do himself, he may entrust to another. The *formula* is given in the Ritual and would read in English as follows: *"We hereby testify that the publications of the marriage between N. and N. have been*

41 Tit. X, c. 5 (ed. Pustet, 1913, p. 330).

duly made by pastor N. of the parish N., to whom (he) N. or (she) N. belongs, as may be ascertained from the papers included. The first publication was made on [date], *the second on* [date], *the third on* [date: day, month, year] *during the parochial Mass, and no canonical impediment was found to be in the way. Wherefore we grant you permission to assist at said marriage.*

Signed: .....

Sealed: ....."

CAN. 1030

§ 1. Peractis investigationibus et publicationibus, parochus matrimonio ne assistat, antequam omnia documenta necessaria receperit, et praeterea, nisi rationabilis causa aliud postulet, tres dies decurrerint ab ultima publicatione.

§ 2. Si intra sex menses matrimonium contractum non fuerit, publicationes repetantur, nisi aliud loci Ordinario videatur.

To emphasize the preceding canon and make it more effective, canon 1030 provides that after the examination and the publication of the banns the pastor shall not assist at the marriage until he has received all the necessary papers, and until at least three days have passed after the last call, unless a plausible reason should dictate otherwise. Should a marriage be delayed for six months after the banns have been published, the publication must be repeated, unless the Ordinary decides otherwise.

The first clause of this canon is decidedly new and, as we have said, devised for the purpose of making sure that the candidates are free. The marriage should not take place on Monday or Tuesday if the last announcement was made on Sunday. Wednesday could be

chosen, for Sunday may be reckoned as one of the three days, since the publication was most probably made in the forenoon. However, if the pastor has a plausible reason, he may go ahead with the marriage sooner, nor need he report the fact to the Ordinary. A plausible reason would be, for instance, if one of the parties or the pastor would have to leave before Wednesday, or if there would be an anniversary of the parents' wedding, etc.

A *report to the Ordinary* must be made if the marriage is delayed for six months after the last call. This is a necessary precaution because it might happen that meanwhile an impediment is contracted or discovered. Hence the *Rituale Romanum* [42] as well as an Instruction of the Holy Office [43] demand repetition of the banns if two or three months have elapsed since the last publication. Our Code extends the time to six months, and says that even then the Ordinary — not the pastor — may declare a repetition unnecessary if he is morally certain that the parties are free to contract Matrimony.

Can. 1031

ASCERTAINING OF THE FREE STATUS

§ 1. Exorto dubio de exsistentia alicuius impedimenti:

1.° Parochus rem accuratius investiget, interrogando sub iuramento duos saltem testes fide dignos, dummodo ne agatur de impedimento ex cuius notitia infamia partibus oriatur, et, si necesse fuerit, ipsas quoque partes;

2.° Publicationes peraget vel perficiat, si dubium ortum sit ante inceptas vel expletas publicationes;

42 Tit. VII, c. 1, n. 11 (*ed. cit.*, p. 212).

43 Aug. 22, 1890, ad VI (*Coll. P. F.*, n. 1740).

3.° Matrimonio ne assistat, inconsulto Ordinario, si dubium adhuc superesse prudenter iudicaverit.

§ 2. Detecto impedimento certo:

1.° Si impedimentum sit occultum, parochus publicationes peragat vel absolvat, et rem deferat, reticens nomina, ad loci Ordinarium vel ad Sacram Poenitentiariam;

2.° Si sit publicum et detegatur ante inceptas publicationes, parochus ulterius ne procedat, donec impedimentum removeatur, etsi dispensationem pro foro conscientiae tantum obtentam norit; si detegatur post primam aut secundam publicationem, parochus publicationes perficiat et rem ad Ordinarium deferat.

§ 3. Demum si nullum detectum fuerit impedimentum, nec dubium nec certum, parochus, expletis publicationibus, ad matrimonii celebrationem partes admittat.

Since the examination of the nupturients and the publication of the banns all tend to ascertain their freedom from canonical impediments and since a *reasonable doubt* may arise in the pastor's mind as to the existence of an impediment, the Code lays down certain rules, which should be applied to disperse such doubts. A *reasonable* doubt is one which is not merely momentarily entertained, but clings to the mind and makes the contrary opinion appear less probable. Thus, if one of the parties was married before, and his consort died in a distant country, from which no certain notice could be gotten, there would be a reasonable doubt — a *dubium facti,* not *iuris.* Doubts of the latter kind must be settled according to the Code, and, if necessary, according to the rules of interpretation and the opinion of the School. Having premised this much, let us hear what the Code

says *of a doubt arising as to the existence of an impediment.*

(1) In such a case the pastor shall investigate more thoroughly by querying at least two trustworthy witnesses (provided the impediment is not defamatory) and also the parties themselves, under oath, if he deems it necessary. Concerning this *examination* several instructions have emanated from the Holy Office,[44] which are summarized in that [45] of Aug. 22, 1890, from which we learn that

(a) The witnesses to be cited may be either men or women, preferably relatives of the contracting parties and citizens.[46] Non-Catholics may be admitted if they are known to be trustworthy.

(b) Before being examined the witnesses must be admonished concerning the sacredness of an oath. Then they must be asked about their name, parents, age, profession and dwelling place, whether they are citizens and how long they have lived in the place. Those who volunteer to testify are to be rejected. Those that are called as witnesses must be questioned, by whom, where, when, how, before whom, and how often they were called to testify. They must also be asked whether they received anything from anyone for acting as witnesses. Then they must be questioned whether they know the contracting parties, their character, social standing, and how long, and in what place and on what occasion the parties became known to them. If a witness says he has no knowledge, he must be dismissed; if he says he knows the parties to the contemplated marriage, he should be asked

44 *Coll. P. F.*, nn. 192, 1267, 1283, 1342, 1399, 1427.

45 *Ibid.*, n. 1740.

46 S. O., Dec. 9, 1874 (*Coll. cit.*, n. 1427, Vol. II, p. 87). *Cives* are contrasted with *exteri*, but the former must be taken as inhabitants, not citizens in the legal sense, whilst *exteri* are outsiders or foreigners who do not live in the parish or diocese.

whether they are citizens (*i. e.,* have a domicile somewhere) or foreigners. If they are foreigners, the proceedings are to be suspended, but if they are known to the witnesses as citizens, the witnesses must be asked in what parish the parties lived or are living, whether one or both of them were ever married before, or made religious profession or received major orders, and if there be any impediment to the Marriage. If the witnesses answer all these questions negatively, they should be interrogated as to the source of their knowledge and whether there is any probability that either of the parties is married or bound by an impediment If the answer is affirmative, proceedings must be stopped, unless other witnesses conclusively prove the contrary. If the answer is negative, then the witnesses must again be asked concerning the source of their knowledge (hearsay, eye-witnesses, etc.?) in order to establish their trustworthiness. If they say that the contracting party was previously married, but that his or her partner is dead, they must be asked about the death and its circumstances and whence they got the knowledge of the former marriage and subsequent death of the other party. If they claim that the death occurred in a hospital, or that they saw the party buried from a certain church or in a certain cemetery, authentic information must be obtained from the respective authorities (hospital, church, cemetery) before permission for the wedding may be granted. If no documents can be obtained, other proofs are admissible. The witness must also be asked whether the surviving party married, or may have married, again. If the answer to the last question is affirmative, permission for the wedding is to be suspended until other witnesses testify conclusively that no marriage has taken place. If the answer is negative, the witnesses should be asked concern-

ing the sources of their knowledge, and after due deliberation the judge or pastor may decide whether or not permission may be granted.

(c) The pastor is not allowed to assist at the marriage of *vagi,* or vagabonds, unless he has obtained the necessary documents from the Ordinaries (see can. 1032).

(d) If the contracting parties, or one of them, is *in prison,* the testimony of the prison chaplain may be admitted as proof of his status; and if this cannot be obtained, the party, if trustworthy, may be admitted to the *supplementary oath.*[47]

This detailed investigation, is, however, to be omitted if the impediment would entail defamation, or rather infamy, upon the parties or one of them. The only defamatory impediments are rape, crime, and public dishonesty.[48]

(e) Where one of these impediments is suspected, the *parties may be put under oath concerning their free state.* This oath, too, is called *supplementary* (*iuramentum suppletorium*) because it is imposed to supply deficient proof. Hence the pastor may ask the parties, or party, to swear on the gospel, or by merely holding up three fingers and calling God as a witness that they speak the truth.

(2) The pastor, says the canon, shall *continue* or *complete the publication of the banns* if the doubt arose before or during the publications, because in that case it is possible that the doubt may be cleared up or stronger proofs be brought showing the existence of an impediment.

(3) If the doubt still remains after the publications, the pastor shall not assist at the marriage before having consulted the Ordinary. An instruction of the Holy Office,

47 S. O., Feb. 28, 1866 (*Coll. cit.,* n. 1283).

48 Cf. canons 1074, 1075, 1078.

Aug. 22, 1670, rules that the publications should not be begun until the pastor has obtained a document from the bishop or his vicar-general, testifying to the free status of the contracting parties. And although this instruction need no longer be followed in regard to time, concerning the necessary paper it is certainly advisable to follow it, since other instructions of the same Holy Office have insisted upon this requirement.[49]

§ 2 says that if the existence of an *impediment is certainly established,* then, (1), if *it is secret,* the pastor shall continue or complete the publication of the banns and refer the matter either to the Ordinary or to the S. Poenitentiaria, without naming the parties; (2) If the impediment is *public* and is (a) discovered *before* the publications are begun, the pastor shall not proceed further until the impediment is removed, even though he may know of a dispensation granted for the court of conscience; (b) if a public impediment is discovered *after* the first or second publication, the pastor shall finish the publications and then report to the bishop.

The difference between a secret and public impediment is explained in can. 1037. From *secret* impediments the Ordinary may have power to dispense, and hence they should be brought before the episcopal court. If the Ordinary cannot dispense, the matter must be referred to the Sacra Poenitentiaria. What is necessary to know concerning that power will be explained in the chapter on *dispensations.*

Reticens nomina does not mean that no names should be given, but that assumed or fictitious names may be made use of. If the *impediment is public,* the proper

49 The consequence is, as said instruction rules (*Coll. P. F.,* n. 192), that the Ordinary has to proceed like the pastor, *i.e.,* according to the rules laid down above.

names are to be stated in the report made to the Ordinary.

The Code further says that any knowledge a pastor may have of a dispensation obtained solely for the court of conscience is tantamount to no knowledge. He may know of the dispensation through the confessional or from some other source; but as a dispensation granted for the internal forum only does not hold for the public forum, the pastor must act as if he had no knowledge at all.

§ 3. If *no impediment* was discovered, either doubtful or certain, the pastor shall, after all the banns have been published, admit the parties to the celebration of marriage.[50]

Can. 1032

Matrimonio vagorum de quibus in can. 91, parochus, excepto casu necessitatis, nunquam assistat, nisi, re ad loci Ordinarium vel ad sacerdotem ab eo delegatum delata, licentiam assistendi obtinuerit.

No pastor shall, except in case of necessity, assist at a marriage of *vagi,* unless he has previously referred the case to the Ordinary of the diocese, or to a priest delegated by the latter, and obtained his permission.

Who are *vagi* is explained in can. 91. They are such as have neither a domicile nor a quasi-domicile, and, with regard to marriage, have not stayed for thirty days in any one place, *i.e.,* parish or diocese.[51] Hence one who has roamed about a diocese for thirty days without settling in any parish thereof, cannot strictly be called *vagus,*

50 *Trid.,* sess. 24, c. 1, *de ref. mat.; Rituale Rom.,* tit. VII, c. 1, c. 2, n. 1 (ed. Pustet, 1913, p. 211 f.).

51 S. C. Sacr., March 12, 1910, ad V: *"Nomine vagorum veniunt omnes et soli, qui nullibi habent parochum vel ordinarium proprium ratione domicilii vel menstruae commorationis."*

and the present canon does not apply to him. Here we perceive the benefit of a "diocesan domicile."

If he is dealing with a real vagabond, and the case is one of necessity, the pastor need not report to the Ordinary, but, *servatis de iure servandis,* may proceed to the marriage. Whether the case is one of necessity is left to the pastor to judge.[52] A soldier who has to leave immediately, as also a pregnant woman, might claim necessity. If the case is not one of necessity,[53] *it must be reported to the bishop.* What the latter must do is stated in the instruction of the Holy Office, Aug. 22, 1890, which demands that the parties produce *authentic documents* from the Ordinaries in whose diocese they have lived for less than a year. If none such can be had, the parties may be admitted to the *supplementary oath* concerning the diocese from which the required documents cannot be obtained. However, this request of the Holy Office is not prescribed by our text, although it may serve as a directive norm. But the supplementary oath of the parties, in case no witnesses or authentic documents can be obtained, should not be omitted.

The "priest delegated by the bishop" may be one delegated for a particular case, or for all matrimonial cases (the chancellor or rural dean). If the custom prevails in a diocese that the procedure concerning the free state of nupturients is reserved to the episcopal court, this custom may be observed.[54]

Can. 1033

Ne omittat parochus, secundum diversam personarum conditionem, sponsos docere sanctitatem sacra-

52 Wernz, *l. c.,* IV, Vol. I, p. 294.
53 *Coll. P. F.,* n. 1740 ad 8.
54 S. C. C., Feb. 1, 1908 ad 11.

menti matrimonii, mutuas coniugum obligationes et obligationes parentum erga prolem; eosdemque vehementer adhortetur ut ante matrimonii celebrationem sua peccata diligenter confiteantur, et sanctissimam Eucharistiam pie recipiant.

The pastor shall instruct the parties, with due regard to their condition, on the sanctity of the Sacrament of Matrimony, on the mutual obligations of married people, and on the duties of parents towards their children; and he shall earnestly exhort them to make a good confession and worthily receive the Holy Eucharist before celebrating the marriage.

This admonition is repeated from the decrees of the Council of Trent [55] and the Roman Ritual.[56] It has been often insisted upon for the reason that Matrimony, being a Sacrament of the living, should be received in the state of grace. As long as the obstacle of mortal sin is not removed, the sacramental grace, *bonum sacramenti, bonum prolis,* and *bonum fidei* cannot take full effect. Therefore the Holy Office, on May 9, 1821, wrote to the Bishop of Kentucky (David) that pastors should insist with all their might upon the instruction of the contracting parties in Christian doctrine and dispose them for the reception of the Sacraments.[57] The Ritual bids them mention the example of Tobias and Sarah, who were addressed by the Archangel Raphael.

But the Code also says "*secundum diversam personarum conditionem.*" This is to be judged according to what was said about the doctrinal examination of the candidates (Can. 1020).

[55] Sess. 24, c. 1, *de ref. mat.*
[56] Tit. VII, c. 1, n. 17.
[57] *Coll. P. F.*, n. 758.

CAN. 1034

CONSENT OF PARENTS

Parochus graviter filiosfamilias minores hortetur ne nuptias ineant, insciis aut rationabiliter invitis parentibus; quod si abnuerint, eorum matrimonio ne assistat, nisi consulto prius loci Ordinario.

This canon grants more liberty than some civil legislators would allow. It was not always so. The Roman law [58] gave great power to parents over their children, and its influence is clearly perceptible in the Decree of Gratian,[59] where the consent of parents is required for the marriage of children, at least if they are minors. Gradually, however, owing to the influence of the University of Paris, the ecclesiastical law began to favor greater freedom from parental control. This is clearly noticeable in the Decretals.[60] Strangely enough, the representatives of France at the Council of Trent insisted that lack of parental consent be declared an invalidating impediment. But the Council did not yield, nay it rejected the view of these theologians by deciding that parental consent is not necessary for a valid marriage.[61]

Our canon says that the pastor shall gravely admonish minors not to marry without the knowledge of their parents or against their reasonable wishes. If they refuse to obey, he shall assist at the marriage only after having consulted the Ordinary of the diocese. Notice the wording, "*young people not yet of age.*" Only minors

58 Cfr. pr. *Inst.*, I, 10; ll. 2, 18, Dig. 23, 2; l. 5, Cod. V, 4.

59 C. un. C. 32, q. 3; cc. 1, 3, C. 30, q. 5.

60 C. 23, X, IV, 1; c. 6, X, V, 17.

61 Sess. 24, c. 1, *de ref. mat.*; *Catech. Conc. Trid.*, P. II, c. 8, § 32; Pallavicino, *Storia del Concilio di Trento*, l. 22, c. 4; Freisen, *l. c.*, p. 307 ff.

are to be thus admonished, not those who are of age.[62]

If the parents *know nothing* of the intended marriage it is the pastor's duty to inform them, whether the contracting parties like it or not. Of course, this rule applies only when conditions are normal. In many cases it will be next to impossible to notify the parents, and then [63] the pastor is excused from that duty. He is also excused, in the opinion of some canonists, if the parents live very far from the place where the marriage takes place.

If the parents know of the marriage, but *oppose it with good reason,* the pastor must consult the bishop. Before doing so, however, he should dispassionately hear the objections, in order to communicate them to the Ordinary. A *reasonable* objection would be, for instance, that the family would suffer disgrace or notable material loss, or that the marriage would cause scandal or dissension, or that one of the parties belongs to a family of low or base degree (jail-bird, irreformable drunkard, gambler), or to a different religion, or is in precarious health. Social distinctions should not weigh much in a democratic state, nor should inequality of wealth, all other things being equal, be a decisive factor.

Unreasonable objections are those inspired by personal dislike or political differences, or based on idle gossip or mere sentiment.

62 Can. 88, § 1.

63 Cfr. De Smet, *l. c.*, p. 333 f.

CHAPTER II

IMPEDIMENTS IN GENERAL

The publication of the banns is intended to disclose impediments, if there be any, and hence the Code logically proceeds to the consideration of the obstacles which may either impede or invalidate a prospective marriage.

The technical term *impedimentum* was coined by the Glossators, and the distinction between *impedientia* and *dirimentia* occurs in the *Summa* of Magister Rolandus, who was followed by Bernardus Papiensis.[1] The *number* of the impediments was not fixed. The gloss *ad pr. C. 27, q. I,* mentions sixteen, Tancred [2] prefers the mystic number fourteen $(7 + 7)$, twelve "diriment" and two "impeding" impediments. Some of the impediments mentioned by these early writers are now grouped under the heading of defective consent. Thus compulsion, fear, condition, error really affect the consent. But there are other obstacles which natural, or divine, or ecclesiastical law has set up in a more particular manner. Berardi [3] has laid down a good rule for distinguishing between invalidating and prohibitive impediments. He says: Those marriages which the natural or positive-divine law reprobates in a more especial manner, are not only illicit, but invalid; marriages which the ecclesiastical law

1 Cfr. Freisen, *l. c.*, p. 222 f.

2 *Summa de Spons. et Mat.*, ed. Wunderlich, p. 17. It may be permitted to say that the term *diriment* is not well chosen. What has not yet been joined, cannot be rent asunder. But the term has the force of custom and is now sanctioned by the Code.

3 *Comment. in Ius Eccl. Universum,* t. III, dissert. IV, c. 1 (ed. Venet., 1778, Vol. II, p. 77).

intends to invalidate must be expressly declared null and void, otherwise they are only illicit. This rule is clearly discernible in our Code.

GENERAL PRINCIPLE

CAN. 1035

Omnes possunt matrimonium contrahere, qui iure non prohibentur.

All can contract marriage who are not forbidden to do so by law.

Marriage being based upon the natural distinction of sex, and intended by the Creator for the preservation and propagation of the human race as well as for the increase of His true worshippers, is permitted to all. This does *not* mean that all men *must* marry. There is no general command that compels each and every individual to contract marriage. Nature itself prevents some from getting married; others are called by God to a state of life which compels them to devote themselves to His exclusive service. This is the doctrine preached by the Apostle of the Gentiles,[4] and it has been followed by the Church and dogmatically defined at Trent.[5] The Tridentine Council condemns those "who say that the conjugal state is to be preferred to the state of virginity or celibacy." Therefore the Code says, "All *can* contract marriage."

It adds: "*who are not forbidden to do so by law.*" The forbidding law may be either the natural or a divine or human law. The natural law, as stated above, prohibits polygamy, whence the impediment of *ligamen* or

4 I Cor. 7, 25 f., 38, 40; cfr. Matth. 19, 11 f.
5 Sess. 24, can. 10, *de sacr. mat.*

existing marriage bond. The natural law also bars from marriage those who are absolutely *impotent, i. e.,* unable to engender children. Hither may also be referred the impediment of *age,* as far as it is connected with impotence. *Blood-relationship* in the degrees of the direct line, and in the first degree of the collateral line, are likewise generally referred to the natural and divine law. But we cannot stretch that law any further. *Human* or *ecclesiastical* law has set up other restrictions, all intended to safeguard marriage, which is preeminently a public institution.

PROHIBITIVE AND DIRIMENT IMPEDIMENTS

CAN. 1036

§ 1. Impedimentum *impediens* continet gravem prohibitionem contrahendi matrimonium; quod tamen irritum non redditur si, non obstante impedimento, contrahatur.

§ 2. Impedimentum *dirimens* et graviter prohibet matrimonium contrahendum, et impedit quominus valide contrahatur.

§ 3. Quanquam impedimentum ex una tantum parte se habet, matrimonium tamen reddit aut illicitum aut invalidum.

§ 1. A *prohibitive* impediment implies a grave prohibition of contracting marriage, but does not render it invalid if contracted.

§ 2. A *diriment* impediment both gravely forbids marriage and prevents it from being contracted validly.

§ 3. Even when the impediment exists only on one side, it renders marriage illicit or invalid.

PUBLIC AND OCCULT IMPEDIMENTS

CAN. 1037

Publicum censetur impedimentum quod probari in foro externo potest; secus est occultum.

An impediment is considered *public* when it can be proved in the external forum; otherwise it is *occult.*

These terms are plain; the difference between prohibitive and diriment impediments lies in their effect, that between public and occult, in their liability to be proved. Stress is, therefore, laid, not on divulgation, as is the case with regard to crimes (can. 2197), but on proof; proof, the text says, which is required for trials in ecclesiastical courts. Hence what a court demands for full proof, or at least admits as proof, according to the prudent judgment of the judge, may and must be considered sufficient for proving an impediment. Whatever, therefore, the Code rules concerning witnesses, documents, etc., their requisites and weight, with regard to ecclesiastical trials in general,[6] and respecting the proofs required for matrimonial cases in particular,[7] should also find congruous application to the publicity of impediments.

Note § 3, can. 1036, which clearly indicates the *individual character* of the marital union. "*Matrimonium claudicare nequit,*" and hence if one party is affected by an impediment, the other party, in virtue of the bilateral contract, is also affected.[8] Therefore, if James suffers from an impediment, his bride Gemma is also affected. Disparity of cult, age, *ligamen,* etc., affect not only the

6 On witnesses, cc. 1754 ff.; on documents, cc. 1812 ff.

7 On proofs for matrimonial trials, cc. 1974 ff.

8 S. O., Sept. 16, 1824 ad 2 (*Coll. P. F.*, n. 784).

party directly concerned, but indirectly also the other. But here a distinction must be made. If James becomes a Catholic, the impediment ceases and he may freely marry his Catholic friend, Gemma. Again, if Gemma and James are second cousins, they suffer equally from the impediment. But if James wants to marry Lola, who is not related to him, the impediment ceases for James. Therefore a distinction must be made between *absolute* and *relative* impediments. The former affects the person completely and with respect to every other person, for instance, *ligamen,* as long as it lasts, and absolute impotency; whereas the latter concerns only a certain person or class of persons. Of little practical value is the distinction between impediments *juris publici* and *juris privati,* except in so far as the right of accusing the marriage is concerned,[9] and in this sense it coincides with the distinction between public and occult impediments.

THE SUPREME ECCLESIASTICAL AUTHORITY

CAN. 1038

§ 1. Supremae tantum auctoritatis ecclesiasticae est authentice declarare quandonam ius divinum matrimonium impediat vel dirimat.

§ 2. Eidem supremae auctoritati privative ius est alia impedimenta matrimonium impedientia vel dirimentia pro baptizatis constituendi per modum legis sive universalis sive particularis.

§ 1. It belongs to the supreme authority of the Church to declare authentically when the divine law forbids or invalidates a marriage.

§ 2. To the same supreme authority belongs the ex-

9 Thus Wernz, IV, ed. 1, p. 345; De Smet, *l. c.,* p. 288.

clusive right to establish, for persons baptized, other impediments, prohibitive or invalidating, by way of universal or particular law.

The first section is based upon the dogmatic decree of Trent which condemns the assertion that only those degrees of consanguinity and affinity which are mentioned in Leviticus (18, 6 ff.) constitute diriment impediments and that the Church has no power to set up others.[10] Our canon also excludes the usurped power of the civil authority which undertakes, of its own accord, to enact laws concerning the dissolubility of marriage. Such an attempt is called violence to the divine and to the natural law, or rather a corruption of the law.[11] But the Church claims exclusive authority only for *declaring* whether the divine law forbids or invalidates a marriage. A palpable example is the impediment of disparity of cult vs. mixed marriage, which both certainly rest on divine law, and that of simple and solemn vows.

§ 2 is also based on the dogmatic canons of the Council of Trent,[12] as emphasized anew against the Rationalists in the *Syllabus* of Pius IX, which was aimed at the so-called Regalists, who pretended that the power of establishing impediments was given to the Church by the civil authority and that the latter ought to do away with them. The power of establishing impediments belongs inherently to the Church and is not derived from the State, as the dogmatical canons of the same council show.[13] The Church claims the right to establish impediments for *baptized persons*.[14] This right may be asserted

10 Sess. 24, can. 3, *De Sacr. Mat.*

11 S. O., July 6, 1817; Sept. 3, 1772 (*Coll.*, nn. 725, 492).

12 Sess. 24, can. 3, 4, 9, *De Sacr. Mat.*

13 Propp. 68–70.

14 There is always the same difficulty concerning the term *baptized*. If *baptized* means what the expression properly conveys, then all, whether Catholics or non-

either by way of a universal or a particular law. A *universal* law is one that affects every province and all persons without exception; a *particular* law is one like the "*Tametsi*," which was conditioned upon local promulgation. Particular laws were the declaration of Benedict XIV concerning mixed marriages in the Netherlands and the "*Provida*" of Pius X for Germany (1906).

But the Church does not deny the power of the State over marriages of non-baptized persons, as is evident from a decision of the S. P. F., of June 26, 1820.[15] However, civil impediments obliging baptized persons, especially that of lack of consent on the part of the parents, are discountenanced by the Church.[16]

THE POWER OF ORDINARIES

CAN. 1039

§ 1. Ordinarii locorum omnibus in suo territorio actu commorantibus et suis subditis etiam extra fines sui territorii vetare possunt matrimonia in casu peculiari, sed ad tempus tantum, iusta de causa eaque perdurante.

§ 2. Vetito clausulam irritantem una Sedes Apostolica addere potest.

The "*vetitum Ecclesiae*" was formerly one of the prohibitive impediments, but has ceased to be such, at least *ipso iure*. Yet the Code vindicates to the local *Ordinaries* the right of forbidding a particular marriage or a

Catholics, are comprised by the term, provided they are validly baptized. An authentic interpretation would not be superfluous.

15 *Coll. P. F.*, n. 744. In China certain ceremonies were prescribed either by law or custom, the non-observance of which rendered marriage invalid; the S. Congregation declared them invalid.

16 S. O., Nov. 17, 1835; S. C. P. F., April 1, 1816 (*Coll.*, nn. 842, 711).

marriage in a particular case. Therefore their power extends only to *individual* cases and, besides, cannot be exercised except for a *just cause*. Such a cause would exist, *e. g.,* if the Ordinary would have reason to doubt the free status of one or both of the contracting parties, either because no papers were received or because papers had been refused by another bishop.[17] Another just cause would be a reasonable doubt as to the existence of an impediment,[18] or a strong presentiment of future trouble.[19] However, the bishop may not forbid a marriage indefinitely, but only for *a time,* as long as the reason lasts.[20] Therefore a certain term should be set, say two or three months, which, in ordinary times, would enable the parties to obtain the necessary papers and remove existing difficulties. Lastly, the Ordinary's power extends only to those who actually live *within his diocese* or are *his subjects, even if they dwell outside the diocese.* Therefore all Catholics who live in a diocese, no matter for how short a time, must abide by the order of the bishop if he forbids their attempted marriage. The same rule applies to subjects who have their domicile or quasi-domicile in the diocese, but momentarily live elsewhere, though in such cases it will be proper to notify the Ordinary of the other diocese.

As to the *effect* of an episcopal prohibition, it may delay a marriage, but *cannot invalidate* it, and hence a marriage contracted against the bishop's injunction is valid if the prescribed form was observed.

A bishop would not exceed his power if he proceeded

17 S. C. C., Feb. 20, 1723 (Richter, *Trid.*, p. 269, n. 112).

18 S. C. C., March 15, 1727 (*ibid.*, n. 113).

19 Cfr. *A. S. S.*, t. 8, p. 211 ff.

20 If the reason for which the prohibition was made, ceases, the prohibition also ceases *ipso facto,* and the pastor may lawfully assist and the parties lawfully contract.

against offending parties and the assisting priest and witnesses with ecclesiastical punishments.[21]

The text ascribes this power *to the Ordinary, i. e.,* to bishops and all who go by the name of Ordinary, therefore also vicars-general. *Pastors* and their assistants, being destitute of jurisdiction *in foro externo,* cannot forbid a marriage, though a pastor may stay a marriage for a while until the case is settled by the ecclesiastical court, to which he would have to report if the contracting parties were *vagi,* or if there were doubts as to the existence of an impediment, or if the parents of a minor would oppose the marriage,[22] or if family troubles could be foreseen.

If the pastor stayed a marriage and refused permission or delegation to his curate to assist at it, the marriage would be invalid, not because of the pastor's prohibition, but on account of lack of permission or delegation. But if the pastor would simply forbid his curate to assist, without expressly restricting the general delegation previously given to him, (can. 1096), the assistant could validly assist at that marriage.[23]

§ 2 mentions the case where the *Apostolic See* forbids a marriage. Only an *invalidating clause* explicitly added to the prohibition, says Benedict XIV, would render invalid a marriage attempted against the Pope's prohibition. If the *decretum irritans* is not expressed in the prohibition, the marriage would be merely illicit. Examples of such prohibition are exceedingly rare. A famous one is that by which Stephan III endeavored to deter Charlemagne from marrying the daughter of Desiderius, King

21 S. C. C., Florentina, Feb. 17, 1629; Feije, *l. c.,* n. 549, p. 424.

22 S. C. C., March 15, 1727 (Richter, *Trid.,* p. 269, n. 113); cfr. can. 1031, §§ 1, 3; 1032, 1034.

23 S. C. C., April 22, 1719 (Richter, *l. c.,* n. 110 f.).

of the Lombards, and the son of Desiderius from marrying Charlemagne's sister, Gisela.[24] That the Pope can make such an invalidating prohibition follows from his power of establishing ecclesiastical impediments.[25]

A kind of prohibition is sometimes made by the S. Congregations, especially if a *matrimonium ratum tantum* is to be dissolved, in the following form: *"Vetito mulieri transitu ad alias nuptias inconsulta S. Congregatione, idque mulieri notificetur ante novam propositionem."* This clause is used in cases of impotence or inviolate virginity, when there is doubt as to the absolute proof of said physiological condition.[26] But this clause does not savor of an invalidating decree.

A prohibition, papal or episcopal, *ceases* by revocation, or lapse of time, or cessation of the cause for which it was made.[27]

THE POWER OF ESTABLISHING IMPEDIMENTS

Can. 1040

Praeter Romanum Pontificem, nemo potest impedimenta iuris ecclesiastici sive impedientia sive dirimentia abrogare, aut illis derogare; item nec in eisdem dispensare, nisi iure communi vel speciali indulto a Sede Apostolica haec potestas concessa fuerit.

What we have said above concerning ecclesiastical legislation will suffice to explain this canon. It is now,

24 Migne 89, 1253 ff.; despite all imprecations the Pope does not employ the *clausula irritans*, but considers the planned marriage invalid because of previous betrothal; hence Wernz (*l. c.*, IV, Vol. II, p. 462) is wrong if he says, *sub poena nullitatis.*

25 Bened. XIV, *De Syn. Dioec.*, XII, 5, 3.

26 S. C. C., Dec. 18, 1869; Dec. 15, 1877 (*A. S. S.*, V, 553; XI, 141).

27 Wernz, *l. c.*, IV, Vol. II, n. 604, p. 467.

and has been since the Council of Trent,[28] the teaching of the Church that the Roman Pontiff alone can either *totally* or *partially abolish impediments* established by ecclesiastical law, whether prohibitive or diriment. Note the term *ecclesiastici iuris,* for impediments of natural or divine law, such as those of *ligamen* or impotency, or blood-relationship of the first degree, can never be abolished or modified by the Pope. But ecclesiastical impediments were established by the Church and can be either totally or partially abrogated by her. No examples of complete abolition of diriment impediments are discoverable in the Code, if we except betrothal with regard to public honesty. But several impedient impediments have been abolished. Thus the *ecclesiae vetitum,* the *tempus feriatum,* the *sponsalia,* the *banns,* have all been done away with.[29] A *partial abrogation of diriment impediments* has been made concerning the degrees of kinship, spiritual relationship, affinity and public honesty.[30]

§ 2 says that the *Sovereign Pontiff alone can dispense* from *matrimonial impediments,* and no one else, unless the power has been granted to him by the common law or by special papal indult. This, too, is now the established teaching and practice of the Church, as may be seen from the condemnation of contrary tenets.[31] Benedict XIV was not a little surprised to hear that some

28 Sess. 24, can. 3, *de sacr. mat.*; c. 2, *de ref. mat.*

29 They were contained in the following verse:

Ecclesiae vetitum, tempus, sponsalia votum,
Mixtaque religio, si proclamatio desit.

30 The *diriment* impediments are contained in this verse:

Error, conditio, votum cognatio, crimen,
Cultus disparitas, vis, ordo, ligamen, honestas,
Aetas, affinis, si clandestinus et impos,
Si mulier sit rapta, loco nec reddita tuto,
Haec socianda vetant connubia, facta retractant.

31 Pius VI, "*Auctorem fidei,*" Aug. 28, 1794, prop. 59 f.; Syllabus of Pius IX, prop. 68.

Polish prelates held a different opinion, especially with regard to the impediments of disparity of cult and mixed religion.[32]

What the general or *common law* grants to Ordinaries is contained in our Code, and they are allowed to go beyond the powers therein conferred only if a *special papal indult* gives them additional faculties. Such an additional faculty is that of April 25, 1918, and August 2, 1918, of which more will be said under can. 1048.

CUSTOM POWERLESS TO ESTABLISH IMPEDIMENTS

CAN. 1041

Consuetudo novum impedimentum inducens aut impedimentis exsistentibus contraria reprobatur.

Customs tending to introduce a new impediment or to abrogate those in force, are hereby reprobated.

There was a custom acknowledged concerning the "*Tametsi*," in so far as it was taken or presumed as a proof that the promulgation of said decree was duly made in a parish. This custom is quite different from one tending to introduce a new impediment, as that which crept into Servia, of regarding the act of being a witness to a marriage as an impediment to marriage. Benedict XIV strictly forbade any such custom.[33]

What the term *reprobated* means has been explained in the first Volume (pp. 112 ff.) of this Commentary. It is the intention of canon 1041 to preclude the rise of such customs, as well as to state that they cannot be called reasonable.

32 "*Magnae Nobis*," June 29, 1748.

33 "*Inter omnigenas*," Feb. 2, 1744, § 17. An even sillier custom, mentioned in the same Constitution, was that of considering the act of shearing the locks of a boy for the first time as an impediment to marriage.

CLASSIFICATION OF IMPEDIMENTS

CAN. 1042

§ 1. Impedimenta alia sunt *gradus minoris,* alia *maioris.*

§ 2. Impedimenta gradus minoris sunt:

1.° Consanguinitas in tertio gradu lineae collateralis;

2.° Affinitas in secundo gradu lineae collateralis;

3.° Publica honestas in secundo gradu;

4.° Cognatio spiritualis;

5.° Crimen ex adulterio cum promissione vel attentatione matrimonii etiam per civilem tantum actum.

§ 3. Impedimenta maioris gradus alia sunt omnia.

§ 1. Impediments are divided into higher and lower.

§ 2. Impediments of a *lower degree* are the following:

1.° Consanguinity in the third degree of the collateral line;

2.° Affinity in the second degree of the collateral line;

3.° Public decency in the second degree;

4.° Spiritual relationship;

5.° The impediment of crime arising from adultery with a promise of, or attempt at, marriage, even by a merely civil contract.

§ 3. *All other impediments are of the higher degree.*

This division was introduced for convenience sake by the officials of the Roman Curia, because dispensations from minor impediments were issued by the subsecretary of dispensations attached to the S. C. of Sacraments, or his substitute, whereas dispensations from major impediments were granted by the Cardinal Prefect or the Secretary of the Congregation.[34]

34 Cfr. *A. Ap. S.*, I, 90 f.

It may here be noted that the Code does not treat as impediments in the proper sense error, servile condition, condition proper, compulsion and fear, but deals with them under ch. V, on Matrimonial Consent, as affecting the substantial form of marriage.

We will now exhibit in parallel columns the impediments of the major and minor degrees as enumerated in the present chapter.

LIST OF IMPEDIMENTS

Major	*Minor*
1. *Age.*	
2. *Impotence* (*iuris nat.*).	
3. *Ligamen* (*iuris nat.*).	
4. *Disparity of Cult* and *Mixed Religion.*	
5. *Sacred Orders.*	
6. *Solemn Profession.*	
7. *Rape.*	
8. *Crime,* with adultery and *uno machinante*, or without adultery, but *utroque machinante.*	1. *Crime* with adultery and promise of marriage.
9. *Consanguinity*, whole direct line and first and second degree of the collateral line (*iuris nat. 1° deg. lin. rectae*).	2. *Consanguinity* in the third degree of the collateral line.
10. *Affinity* in the whole direct line and first degree of collateral line.	3. *Affinity* in the second degree of the collateral line.
11. *Public honesty* in the first degree.	4. *Public honesty* in the second degree.
12. *Legal Adoption.*	5. *Spiritual relationship.*

We put the impediment of mixed religion, though only prohibitive, among the major impediments, as the Code seems to justify this classification (see can. 1071). As to the impedient impediments, a classification of them is superfluous.

DISPENSATIONS

In Vol. I of this Commentary (pp. 173 ff.) the general principles governing dispensations have been outlined. A dispensation is a relaxation of the law in particular or individual cases. The sovereign lawgiver, and he alone, can by his inherent power dispense from laws subject to his domain. Hence the general principle asserted in can. 1040 concerning matrimonial dispensations is but a logical application of the general rule to a special class of dispensations. The same sovereign power may communicate the right of granting dispensations to inferiors, and the communication may be made by law or by *personal commission.* The latter may be given either to single individuals, for instance, the bishop, or a confessor or pastor chosen for this single instance, or by a general commission to Ordinaries as such, at least for a certain time and for certain countries. The powers thus conferred were formerly contained in fixed formularies, which now, however, are obsolete, though the S. C. Consistorialis, in virtue of the decree *"Proxima sacra,"* April 25, 1918, has again granted to the Ordinaries of the U. S. and other far-distant countries faculties concerning matrimonial dispensations which we shall discuss under can. 1048. These faculties we may call *delegated,* as they are delegated by the Supreme Pontiff. Besides, the lawgiver as such, or the *law itself,* has granted to Ordinaries, pastors, and other priests powers with regard to matrimonial dispensations, which consequently belong, as the decree quoted above intimates, to their *ordinary jurisdiction,* and may therefore be delegated to others. Of these the Code says:

POWERS OF DISPENSING GRANTED TO ORDINARIES IN CASES OF DANGER OF DEATH

CAN. 1043

Urgente mortis periculo, locorum Ordinarii, ad consulendum conscientiae et, si casus ferat, legitimationi prolis, possunt tum super forma in matrimonii celebratione servanda, tum super omnibus et singulis impedimentis iuris ecclesiastici, sive publicis sive occultis, etiam multiplicibus, exceptis impedimentis provenientibus ex sacro presbyteratus ordine et ex affinitate in linea recta, consummato matrimonio, dispensare proprios subditos ubique commorantes et omnes in proprio territorio actu degentes, remoto scandalo, et, si dispensatio concedatur super cultus disparitate aut mixta religione, praestitis consuetis cautionibus.

In danger of death, Ordinaries may for the relief of conscience and, if the case demands, for the legitimation of children, dispense their own subjects, wherever they may be, and all other persons actually residing in their territory, from the form of marriage, and from all impediments of the ecclesiastical law, diriment and impedient, public and occult, simple and multiplex, including clandestinity, but not the impediment of priestly orders and affinity in the direct line, arising from consummated marriage.

In granting these dispensations all danger of scandal should be removed, and in the case of disparity of worship and mixed religion, the usual conditions should be imposed.[35]

This is, as noted above, no longer [36] a merely personal

35 Translation adapted from *Irish Eccl. Record,* 1918, Vol. XI, p. 121 f.

36 S. O., Feb. 20, 1888; April 23, 1890 (*Coll. P. F.,* nn. 1685, 1728). In the latter of these decisions the

commission or faculty in the strict sense, but a communication by law. For the rest a delegation is hardly necessary, on account of can. 1044.

Our canon then states under what circumstances, when, by whom, in whose behalf, from which impediment, and under which clauses a dispensation may be granted.

(1) *Circumstances:*

(a) *Danger of death* is present when a physician declares that it is, and the Ordinary may rely on the physician's verdict. Besides, a priest with some practice learns to perceive the danger. Lastly, if the patient himself believes there is danger, he must be believed.

(b) *For the relief of conscience* (*ad consulendum conscientiae*) is a reminiscence of the "*Ne temere,*" art. VII, which has a similar phrase concerning the danger of death, only that it employs the term *imminente,* which is about the same as *urgente.* A conscience needs relief when it is troubled or oppressed by sadness, as is apt to be the case in an illicit marital relation. The term is quite general and does not exclude other causes.[37] The question may arise: Does *ad consulendum conscientiae* refer only to persons in danger of death or may it be applied to others who are in no such danger. Our answer is: As marriage is an individual contract, and the troubled conscience of the party that is not sick may at least indirectly affect the party who is, it would seem that the legislator means also to grant a dispensation in that case. This interpretation is corroborated by a declaration of the Holy Office. A dispute had arisen about the words, "*aegrotos in gravissimo mortis periculo constitutos.*" Some maintained that the faculty (as formerly understood) could be applied only in case the

faculty was explained "*veluti ordinaria.*"

37 Vermeersch, *De Sponsalibus et Mat. (Ne temere),* p. 39.

impediment affected the sick person, but not if the sick person was free (*solutus*) and the impediment affected only the person who was well. Others asserted that the faculty could be applied also in case the sick person was free from impediments and only the other party was involved. The Holy Office decided that the dispensation may be applied in both cases.[38] This answer was the only logical and consistent one that could be given in view of the reasons stated above.

(c) Another and doubtless a grave circumstance is that of *legitimation of children.* Note, however, that this is not a requisite for applying the dispensation; the latter can be granted even if there is no offspring to be legitimated. Hence the insertion, *" et si casus ferat."* Legitimation must be interpreted according to can. 1116 f.

(2) Who are meant by *Ordinaries* is explained under can. 198, to which we refer. The Vicar-general is included here as well as in the following canons. The *diocesan chancellor,* however, is not *ipso facto* included, unless he has obtained the power, which is now an ordinary one, from his bishop, either for a special case or generally.[39]

(3) *On whose behalf* the dispensation may be granted is determined by the words: subjects and actual residents. *Subjects* are those who have their domicile or quasi-domicile in the diocese. There is no need of making use of the privilege of the monthly sojourn, for all *actual residents* may avail themselves of this favor. There is this

38 S. O., July 1, 1891 (*Coll. P. F.*, n. 1758), the example is as follows: *" Unde quum civiliter sint coniuncti, aut alias in concubinatu vivant, ex gr., puella soluta et diaconus, illaque aegrotante, hic valens sit, possetne Ordinarius cum his dispensare? Vel si monialis aegrotans in concubinatu viveret cum diacono bene valente, essetne locus dispensationi, quum diaconus non sit in gravissimo mortis periculo constitutus?"*

39 Can. 199, § 1.

difference, however, between these two classes of persons, that the Ordinary's power, because voluntary, may be exercised over his subjects even outside his own territory. The distinction is of little practical value, because if subjects of the diocese of St. Joseph actually dwell in Kansas City, the bishop of the latter diocese may dispense them. The case is somewhat different if one travels on land or sea, because an Ordinary can dispense his own subjects everywhere, hence also in a monastery of exempt religious.[40]

It has been customary with canonists [41] to assert that a dispensation can be applied only when a person had *either contracted a civil marriage or lived in concubinage.* This condition is *no longer required,* for the Code makes no such restriction, and Cardinal Gasparri has, certainly not without reason, omitted to cite the decision of Sept. 17, 1890, to which canonists were wont to appeal. For the rest it may be stated that this condition was not attached to the dispositive part of the well-known decree of Feb. 20, 1888.[42] Let us illustrate. James is about to marry Gemma, who is his second cousin, and with whom he has had illicit relations which were apt to result in pregnancy. But he is overtaken by the influenza and in danger of death. Here the Ordinary may grant a

40 The text says: "*locorum Ordinarii,*" and hence religious superiors are excluded. That exempt religious are residents of a diocese needs no proof, for exemption — unless there is question of an *Abbatia Nullius* — is not directly local, but personal. That such religious belong to a diocese also follows from the fact that they receive not only orders, but also faculties from *their* Ordinaries.

41 Thus Wernz, *l. c.,* IV, Vol. II, n. 617, p. 493; De Smet, *l. c.,* p. 491.

42 Neither was this clause inserted in the decision of March 1, 1887 (*Coll.,* n. 1698), to which Wernz (*l. c.*) refers. But it is true that the decree of Feb. 20, 1888, refers to that condition in the narrative part, and that the decision of Sept. 17, 1890, directly contains this clause; wherefore the authors mentioned were perfectly entitled to their interpretation.

dispensation. We again refer to what was stated under n. I, *viz.,* that even if the sick party is not affected by the dispensation, *e. g.,* in case of disparity of cult, the dispensation may be made use of. Note, however, what is said *infra,* under (5).

(4) What *impediments may be dispensed from?* The Code says: *all impediments of the ecclesiastical law,* whether public or occult, diriment or impedient, with the sole exception of the priesthood and affinity in the direct line. Hence, negatively speaking, no *dispensation can be granted* for the impediment of *ligamen* or marriage bond; impotence; consanguinity in the direct line, and — at least most probably — in the first degree of the collateral line; affinity in the direct line; and sacred orders, *i. e.,* the priesthood. But dispensations may be granted from all impediments, public or occult, diriment or impedient, which latter include the five vows mentioned in can. 1058 and the impediment of mixed religion. That of clandestinity is also included in the ordinary power of dispensation, and solemn profession and the sacred orders up to subdeaconship and the diaconate may be dispensed from in such circumstances. Neither does the Code require that the Holy Office should be notified of dispensations granted to solemnly professed persons or persons in sacred orders if they recover.[43] The multiplex impediments of consanguinity and affinity[44] may also be dispensed from by the Ordinary in the case mentioned.

(5) There are three clauses or *clausulae* which affect the application of this dispensing power variously: (a) The *consummato matrimonio* refers only to affinity; otherwise it should have found its place either at the beginning of the canon or immediately before the *remoto scandalo.*

43 Such notification was required by the decree of Feb. 20, 1888.

44 Cfr. can. 1076 f.

The "*consummato matrimonio*" appears to be a substitute for the former "*ex copula licita*" (S. O., 20 Feb., 1888; S. C. Sacr., 29 July, 1912). This clause could not refer to the impediment of the priesthood, else the consequence should be that, provided this illegitimate union be not consummated, the Ordinary may dispense. This certainly cannot be the intention of the lawgiver. We add, concerning the dispensable impediments, that even though the copula had been concealed, dispensation is valid. Furthermore, in these circumstances, the Ordinary, pastor, or priest may dispense from the form prescribed, and, therefore, need not call any witnesses. The power, lastly, extends to marriages, *contracta* and *contrahenda* (S. O., 18 March 1891; S. C. Sacr., 29 July, 1910).

(b) *Remoto scandalo,* as enjoined by the decree of Feb. 20, 1888, especially concerning religious and clergymen dispensed in danger of death. If they recover, the decree says, they should be induced to leave and go to some place where their ecclesiastical status is unknown, or if this is impossible, they should be given a wholesome penance and have a conduct prescribed that would repair the scandal given to the faithful. Concerning other persons the decree is silent. The scandal of concubinage is removed by marriage, which should be made known to those who were scandalized, either by the pastor or by the parties themselves. This clause does not affect the validity of the dispensation.

(c) Concerning the impediments of *disparity of cult* and mixed religion the legislator requires that the usual condition imposed for such marriages should also be demanded in cases where there is danger of death. Now in case of disparity of cult these conditions (called *reversales*) must be demanded and obtained under *pen-*

alty of the dispensation being null and void;[45] in case of mixed marriages the validity, of course, is not affected, as this is only a prohibitive impediment.

POWERS GRANTED TO PRIESTS

CAN. 1044

In eisdem rerum adiunctis de quibus in can. 1043 et solum pro casibus in quibus ne loci quidem Ordinarius adiri possit, eadem dispensandi facultate pollet tum parochus, tum sacerdos qui matrimonio, ad normam can. 1098, n. 2, assistit, tum confessarius, sed hic pro foro interno in actu sacramentalis confessionis tantum.

This canon extends the favor to *parish priests* and to every *priest* who is called upon to assist at a marriage in accordance with can. 1098, n. 2, as well as to *confessors*. But there is a restriction: pastors, assistant priests, and confessors can use this faculty only when access to the Ordinary is impossible, and confessors only in the court of conscience and in the act of sacramental confession. Otherwise the power granted to the Ordinary by can. 1043 may be used by these to the same extent and in the same urgent cases.

(1) *Pastors* enjoy the faculty, not assistants as such, unless they are actually in charge of souls. Vice-pastors and chaplains are excluded.[46] However, since

(2) Every *priest* who is entitled to assist at marriages according to can. 1098, n. 2, may use the faculty of dispensing, assistants may also exercise it. Whether the pastor may, within his own district, delegate his assistant to assist at a marriage which would not fall under can.

45 S. O., March 18, 1891 (*Coll.*, n. 1750); June 21, 1912 (*A. Ap. S.*, IV, 442 f.).

46 S. O., April 23, 1890 (*Coll.*, n. 1728).

1098, is not quite evident. The text as well as a decision of the Holy Office seem rather against such delegation.[47] On the other hand, since the power is given by law, and not merely by the Ordinary as a subdelegated faculty,[48] and since the pastor is empowered to delegate his authority of assisting at marriages to any priest within his district, it would seem that he may also delegate his assistant for such a case. This is our personal view.

(3) The *confessor* may make use of the power granted by law only in the *court of conscience* and in the *act of sacramental confession.* Here a doubt may arise as to public impediments, *e. g.,* consanguinity in the third degree. For example: James, being in danger of death, is engaged to Gemma, who is his second cousin. Father John is his confessor, but not his pastor. The couple would like to get married. What shall Father John do? The first thing he should do is to ask the pastor of James to hurry to the sickbed, or if no time is left for that, Father John should act himself, not as confessor, but as a priest who is allowed to assist by virtue of can. 1098, n. 2, and call two witnesses, after having heard James's confession. In the presence of two witnesses Father John should then ask and receive the consent of James and Gemma and say: "By the authority granted to me by the Holy Church, I dispense you from this impediment and unite you in the holy bond of matrimony." If the impediment is occult and concerns James only, Father John may grant a dispensation in the act of sacramental confession, and then assist at the marriage as above.[49] If the impediment is public, he may also

47 *Ibid.*: "*posse illam subdelegare habitualiter parochis tantum.*"

48 This is supposed in the decree just alleged.

49 No recourse to the Holy See is required for a dispensation; cfr. Feije, *l. c.,* n. 638, p. 576.

dispense in the act of sacramental confession, but as this is valid only for the court of conscience, a regular dispensation will have to be asked for afterwards.[50]

(4) Pastors, priests, and confessors can make use of the faculty here under consideration only when *access to the Ordinary is impossible.* This impossibility must be understood of the ordinary means of communication, by messenger, letter, or "express." Concerning *telegraphic* communication, the Holy Office has decided that a dispensation given by the Ordinary in response to a telegraphic message, is not valid before the authentic document of the grant of favor has arrived, unless the message was sent officially by authority of the Holy See.[51] As to the use of the *telephone,* its validity depends upon prompt, reliable, and secret service. The ordinary "party line" is no trustworthy and confidential means of communication. But in no case is the use of the telegraph or telephone mandatory,[52] and even if these means of communication are available, pastors or priests or confessors could safely make use of the faculty granted by can. 1044.

In order to complete our notes on these two canons it may be well to ask a question concerning the distinction between a *marriage to be contracted* and *a marriage already contracted.* Does the power of the Ordinary and the faculty of the pastor, priest, or confessor hold *in both instances?* The answer is yes, because the Code makes no distinction, though this was not the common

50 Either from the Ordinary, if he enjoys the faculty, or from the Holy See, *i. e.,* the S. Cong. of the Sacraments. This dispensation is not superfluous, even if the other party should die in the meanwhile, because the marriage has to be verified and registered, and the offspring perhaps legitimated.

51 S. O., Aug. 24, 1892 (*Coll.,* n. 1810).

52 Thus also De Smet, p. 507 (ed. 2).

doctrine of writers before the Code.[53] Their attitude was doubtless based upon the theory that the faculties could be applied only in cases of civil marriage or concubinage. But the decision of the S. C. Sacr. had already done away with that theory.[54]

CASUS PERPLEXUS

CAN. 1045

§ 1. Possunt Ordinarii locorum, sub clausulis in fine can. 1043 statutis, dispensationem concedere super omnibus impedimentis de quibus in cit. can. 1043, quoties impedimentum detegatur, cum iam omnia sunt parata ad nuptias, nec matrimonium, sine probabili gravis mali periculo, differri possit usque dum a Sancta Sede dispensatio obtineatur.

§ 2. Haec facultas valeat quoque pro convalidatione matrimonii iam contracti, si idem periculum sit in mora nec tempus suppetat recurrendi ad Sanctam Sedem.

§ 3. In iisdem rerum adiunctis, eadem facultate gaudeant omnes de quibus in can. 1044, sed solum pro casibus occultis in quibus ne loci quidem Ordinarius adiri possit, vel nonnisi cum periculo violationis secreti.

§ 1. Under the conditions laid down in can. 1043, if the impediment is discovered when everything is ready for the marriage, and the ceremony cannot be delayed without the probable danger of a grave inconvenience until a dispensation is obtained from the Holy See, Ordinaries can dispense from all the impediments mentioned in the same canon.

§ 2. This faculty holds good for the revalidation of a

53 Cfr. Putzer, *Comment. in Fac. Ap.*, p. 83 (ed. 4); Wernz, *l. c.*, IV, Vol. II, n. 617, p. 493.

54 S. C. Sacr., Venet., Aug. 16, 1909 (*A. Ap. S.*, I, 656).

marriage already contracted, if delay is dangerous and there is no time to have recourse to the Holy See.

§ 3. In the same circumstances the pastor, priest and confessor mentioned in can. 1044 enjoy the same faculty, but they are allowed to apply it only in occult cases which admit of no recourse to the local Ordinary or if access to the Ordinary would entail danger of violating the secret.

This is the well-known *casus perplexus* of canonists,[55] which, however, by reason of can. 1043 and 1044, is now reduced to a minimum.

(1) The *local Ordinaries* empowered to grant a dispensation are all those mentioned in can. 198, therefore also the vicar-capitular and the vicar-general.

(2) They must observe the conditions or *clausulae* mentioned in can. 1043, *i.e. scandal must be removed*, if there be any, because the case of one in sacred orders or with solemn profession is hardly imaginable. But the other clause may easily occur; hence the *conditions* required for *disparity of cult* and *mixed religion* must by all means (and under penalty of the nullity of the dispensation) be complied with.

(3) The *impediments* from which the dispensation may be granted are those set up by *ecclesiastical law* only, with the sole exception of the priesthood and affinity in the direct line. Whether these impediments be diriment or impedient, occult or public, matters nothing; the Ordinary may dispense from all except the two expressly mentioned.

(4) The *circumstances* in which the dispensation may be granted are (a) if everything is ready for the marriage (*omnia sunt parata ad nuptias*) and (b) if *the marriage cannot be postponed without the probable danger of*

[55] See, for instance, Feije, *l. c.*, n. 640 ff., p. 581 ff.

a serious inconvenience until the dispensation could be obtained from the Holy See. No doubt the latter clause determines the first one. It is not necessary for the couple to be already in church for the wedding.[56] We understand the phrase "all things ready for marriage" to mean that the final arrangements have been made and the day set for the wedding. The reason why the marriage cannot be postponed is the *probable,* not certain, *danger of a grave inconvenience,* such as the fear that one of the parties might change his mind, or the probability that scandal or disgrace might arise from a delay.[57] Pregnancy of the bride would also justify the granting of the dispensation, for this is a grave inconvenience.

What if the parties have *purposely* waited until the last moment, and hence are evidently not in good faith, especially if neither of them shows signs of repentance? Some authors who wrote before the Code would not permit a wedding under these conditions. However, the old rule must be applied: The law does not distinguish, and hence neither are we at liberty to distinguish, and therefore, even if the impediment were purposely concealed up to the last moment, when recourse to the Holy See is no longer possible, a dispensation may be granted by the Ordinary. Abuse or frivolous extension of the power need not be feared,[58] for the publication of banns and the careful investigation and examination imposed on the pastor will naturally reduce such cases to a minimum. Besides, if the Ordinary is afraid of abuses creeping in, he may and should at times refuse to grant a dispensation, in order to procure the necessary respect for ecclesiastical laws.

56 Thus Feije, *l. c.,* n. 642, p. 586.

57 Feije, *l. c.,* p. 586.

58 This was the argument of Card. Gousset; *apud* Feije, *l. c.,* n. 644, p. 594.

§ 2 rules that the faculty can also be applied in case of a *marriage already contracted that needs to be revalidated,* the two conditions required being the same: danger in delay and no time for recourse. Cardinal Gasparri refers to a decision of the Holy Office,[59] which reads thus: What should a pastor or priest do in case he is called to the sickbed of a Catholic who was married civilly to an infidel or heretic and is now almost unconscious? Answer: Let the bishop or pastor make use of the faculty granted to the Ordinaries on Feb. 20, 1888, and let the parties renew their consent and promise to comply with the conditions required [for mixed marriages]. Hence the Ordinary should simply grant a dispensation (by telephone, if necessary) and the priest should require renewal of the consent, after he has obtained an oral[60] promise of complying with the required conditions.

§ 3 applies what is laid down in §§ 1 and 2 to the pastor, priest, and confessor referred to in can. 1044, with the additional proviso *that the case be occult and admit of no recourse to the Ordinary,* or that such recourse would endanger the secrecy of confession. Here it is evident that telephone and telegraph are excluded, and hence only the mails or a messenger can be employed. The case must be *occult.* An occult case would be one involving a secret crime or the vow of chastity.[61] It may also happen that a party was regarded as Catholic and was not even baptized,[62] or that one was godfather or

59 July 6, 1898, ad 3 (*Coll.,* n. 2007).

60 Can. 1061 prescribes written promises as "a rule," but this rule may, in such circumstances, be licitly dispensed with.

61 Affinity *ex copula illicita,* which formerly was counted among the occult impediments, no longer exists, either as an impediment or as a penalty in regard to the *debitum petendi.*

62 S. O., Aug. 22, 1906, ad 4 (*Anal. Eccl.,* t. XV, p. 8).

godmother to the party whom he or she wishes to marry. All these cases may be occult, *i. e.*, they could not be proved in an ecclesiastical court, because there were no witnesses [63] or no record in the baptismal register. Hence if the pastor or priest or confessor alone knows of the impediment, he may dispense from it. But only in that case. If the impediment were occult at the moment of marriage but could be proved in court, because, as said under can. 1037, two witnesses knew of it or an authentic document existed, no dispensation could be granted by these clergymen. The ancient theories of simulation and cessation may henceforth be discarded, for it is not likely that the Code permits a pastor to apply these thories *in casu perplexo,* although we would not assert that the old view on cessation of human laws under urgent conditions is absolutely inapplicable in all circumstances.[64] But simulation [65] of marriage with a fictitious or conditional consent we hold to be unworthy of the marriage contract.

DISPENSATIONS TO BE REPORTED AND RECORDED

CAN. 1046

Parochus aut sacerdos de quo in can. 1044, de concessa dispensatione pro foro externo Ordinarium loci statim certiorem faciat; eaque adnotetur in libro matrimoniorum.

The S. C. of the Propaganda advised the priests of Ireland not only to keep copies of, but also to record, matrimonial dispensations.[66] Now the Code demands

63 Cfr. *A. S. S.*, t. 12, p. 422; can. 1037.

64 Feije, *l. c.*, n. 648, p. 601 f.

65 Cfr. *prop. 29 damnata ab Innocentio XI* (Denzinger, n. 1046).

66 S. C. P. F., July 21, 1791 (*Coll.*, n. 605). The cause of not registering dispensations was probably not carelessness, but some diplomatic or political reason.

that the pastor or priest — the confessor [67] is exempted — immediately inform the Ordinary of every dispensation granted *in foro externo* and also record the same in the matrimonial register. Of course, the validity of a dispensation does not depend on the fact of its being duly reported and recorded.

DISPENSATIONS FOR THE INTERNAL FORUM

Can. 1047

Nisi aliud ferat S. Poenitentiariae rescriptum, dispensatio in foro interno non sacramentali concessa super impedimento occulto, adnotetur in libro diligenter in secreto Curiae archivo de quo in can. 379 asservando, nec alia dispensatio pro foro externo est necessaria, etsi postea occultum impedimentum publicum evaserit; sed est necessaria, si dispensatio concessa fuerat tantum in foro interno sacramentali.

The text distinguishes between a dispensation from an occult impediment granted for the court of conscience, but *extra-sacramentally,* and a dispensation granted in the act of sacramental confession. The former should be carefully recorded in a special book to be kept separately in the diocesan archives, as mentioned in can. 379. No new dispensation is necessary for the external forum if the occult impediment should afterwards become public. On the other hand, a dispensation granted in the *act of sacramental confession* does not hold in the external forum, and therefore a new dispensation is required if the impediment becomes public. The beginning of the canon should not be overlooked: "*unless a rescript of the S. Poenitentiaria ordains otherwise.*"

[67] Why the confessor is exempt is evident from the fact of the impediment being occult, not to speak of the seal of confession.

Under can. 258 the S. P. is competent in matters concerning the *internal forum.* However, this must duly be distinguished, for the favors granted by that sacred tribunal may be applied outside of *sacramental confession, e. g.,* dispensation from vows or from occult impediments, or they may be restricted to the *act of sacramental confession, e. g.,* absolution. Besides, this same tribunal grants faculties to Ordinaries for a certain term of years, five or three. The procedure is governed by the Constitution of Benedict XIV, "*In Apostolicae,*" of April 13, 1744, and by the special rules laid down in the "*Sapienti consilio*" of Pius X, which demands that the Cardinal Poenitentiarius should have written rules signed by himself.[68] A special feature of this tribunal is that it must keep everything *secret* and grant its favors entirely *gratis.* All its officials are bound by a solemn oath. Its *present competency* must, as stated above, be measured by the powers granted by the "*Sapienti consilio,*" not by the "*Pastor bonus,*" of Benedict XIV (April 13, 1744). In matrimonial matters the term *occult impediment* must be taken as defined in can. 1037: it is one which cannot be proved in the external forum. Therefore the faculty formerly enjoyed by the S. P. "for the second degree of consanguinity and affinity, if the impediment lasted at least ten years and the petitioners had contracted publicly and lived as married people," [69] no longer exists. All depends on the occult nature of the impediment *and* on the manner of expediting the favor. If the impediment was occult and the dispensation was applied outside the confessional, for instance, by the pastor, the dispensation holds good *in foro externo* in case the impediment becomes public.

The reason for demanding a *new dispensation* in place

68 *A. Ap. S.,* I, 101 f.

69 "*Pastor bonus,*" § 40.

of one applied only in the sacramental act, if the impediment becomes public, lies in the seal of confession;[70] whence extra-sacramental and sacramental application are, as it were, two different departments, though both directly concern the court of conscience. The clause therefore: *"nisi aliud ferat S. P. rescriptum,"* can refer only to registration, as the grammatical construction seems to confirm. The meaning is: should the rescript forbid recording, for instance, in the case of a crime or vow, notation must be omitted; otherwise it must be made in the special secret record which is to be kept.

We may add that the S. P. is no longer empowered to dispense from any public impediment, no matter whether the petitioners are poor (*in forma pauperum*)[71] or wealthy. This was the custom before the Constitution *"Sapienti consilio"* of Pius X and was based on the fact that this sacred tribunal granted all its favors gratis.

FACULTIES OF ORDINARIES

Can. 1048

Si petitio dispensationis ad Sanctam Sedem missa sit, Ordinarii locorum suis facultatibus, si quas habeant, ne utantur, nisi ad normam can. 204, § 2.

If application for a dispensation has been made to the Holy See, local Ordinaries should not use the faculties they have, except in accordance with can. 204, § 2. This canon rules that an inferior shall not interfere in matters

70 Because from this no public document could issue, which would prove the marriage, always remembering that marriage in itself is not of a private, but of a public character.

71 Before the Constitution *"Sapienti consilio"* petitions of poor people, although concerning a public impediment, were directed, not to the Apostolic Datary, to which they belonged, but to the S. Poenit.

brought before a superior except for grave and urgent reasons, in which case he must immediately notify the superior.

This canon supposes that: (1) a petition was sent to Rome for a dispensation from a matrimonial impediment, and that (2) the Ordinary has power to grant same. If he had no faculties, interference would not only be ridiculous but presumptuous. Here we may briefly state the contents of a decree of the S. C. Consist., "*Proxima sacra,*" of April 25, 1918, as compared with that of Aug. 2, 1918.

FACULTIES OF THE ORDINARIES OF THE U. S. AND GREAT BRITAIN

1. By *Ordinaries*[72] here are understood those who are under the jurisdiction of the S. C. Consistorialis; those under the S. C. Propaganda Fide continue to enjoy the same faculties as before.

In regard to matrimonial dispensations these Ordinaries are *no longer entitled* to use the faculties formerly granted in various formularies, but their faculties are now (since May 19, 1918) determined solely by the Code.[73]

2. The faculties granted by the S. Poenitentiaria remain *intact.* Therefore, as far as this sacred tribunal is able to grant faculties to our Ordinaries, these are only given for *occult impediments,* as described under can. 1037 and 1047.

72 By "Ordinaries" here are understood those mentioned in can. 198, but the "*Abbas Nullius*" of Belmont, North Carolina, as Vicar Apostolic belongs to the S. C. de Prop. Fide; thus also the Vicars-Apostolic of Alaska, of Athabaska and Mackenzie (Canada), of British Honduras, the Hawaii or Sandwich Islands, and Queensland, Australia.

73 The *quinquennium* dates from May 18, 1918.

3. The decree ratifies the ruling of *canons 1043–1045* concerning danger of death and the *casus perplexus* explained above.

4. Both decrees grant the faculty of dispensing from *minor impediments*. The "Proxima," April 25, 1918, also permitted the Ordinaries to *revalidate* in the root marriages invalid on account of one of these impediments, provided can. 1133–1140 be observed, and allowed Ordinaries to dispense from those *major impediments* which are of merely ecclesiastical law, with the exception of affinity in the direct line and priesthood. But said decree did *not clearly grant* the faculty of *sanatio* in the case of these five impediments. Besides it contained the *clause:* "if the petition has been sent to the Holy See and urgent necessity has supervened, pending a recourse."

5. The *decree of Aug. 2, 1918,* has taken away this clause, but at the same time it has limited the faculty of dispensing from major impediments and mixed religion and revalidating such marriages, invalidly contracted on account of one of the major impediments, to the "*duration of the present dire condition of war.*" This latter clause is set forth most conspicuously.[74]

6. Therefore the *quinquennial faculties* comprise the power of dispensing from the minor impediments, to wit: consanguinity in the second degree of the collateral line, affinity in the second degree of the collateral line, public honesty in the third degree, spiritual relationship, crime with adultery and promise of marriage. These same marriages may also be healed in the root, with due observance of can. 1133–1140. This faculty was granted

[74] The clause "*adiunctis, quae modo sunt, perdurantibus,*" as long as these conditions last, appears to be a hint that the Holy See is resolved to put the Code into practice after the war. But it may be permitted to say that disparity of worship and mixed religion would certainly demand some swifter expedient.

for five years, not only for the duration of the war.

7. The *war-faculties* comprise the power of dispensing from major impediments (two excepted) of ecclesiastical law, either public or occult, simple and multiple, and of revalidating marriages invalid from such impediments without recourse to the Holy See; also of dispensing from mixed religion without recourse.

8. The Holy See, according to decree of Aug. 2, 1918, expects the Ordinaries to render *an annual account of all the dispensations* granted *during war-time* and to refund the fees for such dispensations granted by the Ordinaries.

9. We learn, through Rt. Rev. Bishop V. Wehrle, O.S.B., that the Roman Court is willing to acknowledge the right of Ordinaries to make use of can. 81, also with regard to matrimonial dispensations.

10. Note, finally, that can. 204, § 2, referred to in can. 1048, demands a grave and urgent cause, without which an Ordinary, being inferior to the Sovereign Pontiff, can neither validly nor licitly dispense. A *grave* cause is one which touches the intrinsic nature of the case, or, in other words, one which the law has acknowledged as canonical. An *urgent* reason is one which, because of time or circumstances, brooks no delay. For the validity of a dispensation a grave cause is sufficient. What are considered canonical reasons will be explained under can. 1054.

CUMULATIVE FACULTIES

CAN. 1049

§ 1. In matrimoniis sive contractis sive contrahendis, qui gaudet indulto generali dispensandi super certo quodam impedimento, potest, nisi in ipso indulto aliud expresse praescribatur, super eo dispensare etiamsi idem impedimentum multiplex sit.

§ 2. Qui habet indultum generale dispensandi super pluribus diversae speciei impedimentis, sive dirimentibus sive impedientibus, potest dispensare super iisdem impedimentis, etiam publicis, in uno eodemque casu occurrentibus.

This canon betrays a greater liberality on the part of the lawgiver than was usual with canonists, who based their views on former decisions. Two different cases are distinguished: dispensation from multiplex impediments of the same species but of *different degrees,* and dispensation from several impediments of the same degree but of a *different species.* The grant of these faculties must be made by a *general indult,* not merely by a rescript in a particular case. Such a general indult no doubt is that granted by the "*Proxima sacra,*" April 25, 1918, and by the decree of Aug. 2, 1918. The canon makes the restriction: "*nisi in ipso indulto aliud expresse praescribatur,*" *i. e.,* unless the indult explicitly declares otherwise. Therefore the wording of each indult must be carefully examined. The two decrees just mentioned contain no such clause, and therefore our bishops certainly enjoy the powers granted in virtue of this canon as long as the general indult shall last.

§ 1 grants to those who are endowed with a general indult the faculty of dispensing from an *impediment,* although it be *multiple,* no matter whether there is question of a marriage already contracted or to be contracted. For instance, one is related to his partner in the second degree by a double *stipes* arising from the same common progenitors, or is related in the third degree and also in the second degree on account of common progenitors (can. 1076). In that case the degree is multiple, but the species is the same. This practice is also followed by

the S. Poenitentiaria,[75] and therefore is to be applied to occult impediments.

§ 2 extends the cumulative faculties to impediments of a *diverse species*. He who has a general indult to dispense from several impediments of a diverse species, be they diriment or impedient, can dispense from these same impediments if several of them occur in the same case. This would happen if, *e. g.*, disparity of cult concurred with consanguinity. There was no doubt that, if a public impediment, *e. g., public honesty,* coincided with an *occult* impediment, *e. g.*, crime, the faculties could be used cumulatively.[76] But there was doubt as to cumulation when two impediments of a different subspecies, as is the case in crime with its three diverse distinctions, concurred. Besides it was denied that the faculties could be "bulked" if two different kinds, as exemplified in consanguinity and disparity of cult, would concur. Our text, however, admits cumulation in both these cases, even though two or more impediments concur in the same case. Furthermore the text permits cumulation in cases of two different impediments, one being prohibitive only whilst the other is diriment.[77] For instance, if Gemma, who has made the vow of celibacy, wishes to marry James, who is her second cousin, the Ordinary, or any one who has the faculty, may grant a dispensation. From the vow of *non-nubendi* or celibacy the Ordinary may dispense because that vow is not reserved,[78] and from the impediment of consanguinity by virtue of the decree or

75 S. O., June 19, 1861; June 15, 1875; April 2, 1892 (*Coll.*, nn. 1218, 1445, 1789); S. Poenit., April 20, 1883 (*Coll. cit.*, n. 1595).

76 S. C. P. F., March 31, 1872 (*Coll.*, n. 1382).

77 S. O., April 2, 1892; Aug. 18, 1897 (*Coll.*, nn. 1445, 1979); but n. II of the last-named decision would exclude cumulation in case one impediment was a diriment and the other a prohibitive one, if the latter was either that of mixed religion or arose out of the vow of perpetual chastity.

78 Can. 1309.

general indult granted April 25, 1918. From both together in one and the same case he may dispense in virtue of our canon 1049.

CONCURRENCE OF DISPENSABLE AND INDISPENSABLE IMPEDIMENTS

CAN. 1050

Si quando cum impedimento seu impedimentis publicis super quibus ex indulto dispensare quis potest, concurrat aliud impedimentum super quo dispensare nequeat, pro omnibus Sedes Apostolica adiri debet; si tamen impedimentum seu impedimenta super quibus dispensare potest, comperiantur post impetratam a Sancta Sede dispensationem, suis facultatibus uti poterit.

This text also supposes a general indult or general faculties, not merely a particular indult for an individual case. However, it is safe to say that at present this canon does not affect our American Ordinaries, for it supposes Ordinaries who have limited faculties with regard to certain impediments *iuris ecclesiastici,* but can not dispense from other impediments of the same class. The meaning is that if an impediment from which they cannot dispense, concurs with another public impediment, or with several public impediments, from which they can dispense, they must *petition the Apostolic See for all impediments.* If, however, the impediment or impediments from which they can dispense are discovered only after petitioning the Holy See for a dispensation, they may make use of their faculties.

A letter of the S. C. P. F. to the delegate of Syria at Beirut[79] will illustrate our canon. According to the

79 S. C. P. F., May 10, 1887 (*Coll.*, n. 1674).

common doctrine of theologians it is necessary to explain all the impediments and circumstances that prohibit a marriage, otherwise the dispensation is invalid. This exposé must be made in one and the same petition, because the whole matter in all its bearings must be made known to the one who dispenses, and a greater number of impediments renders the dispensation more difficult. Therefore if a diriment impediment which requires recourse to the Holy See (or a Patriarch, if he has the faculty) concurs with another diriment or impedient impediment from which the bishop can dispense, both must be explained to the Holy See. If this is not done, the bishop can not validly dispense from the impediments from which he could otherwise dispense. The Code annuls a decision of the S. Poenitentiaria [80] which denied the validity of the dispensation granted by the bishop in a matter subject to him. Therefore the second clause of our canon says that in case of the discovery, *after a dispensation* has been granted by the Holy See, of an impediment from which the Ordinary can dispense, he may apply his faculty.

LEGITIMATION OF CHILDREN

CAN. 1051

Per dispensationem super impedimento dirimente concessam sive ex potestate ordinaria, sive ex potestate delegata per indultum generale, non vero per rescriptum in casibus particularibus, conceditur quoque eo ipso legitimatio prolis, si qua ex iis cum quibus dispensatur iam nata vel concepta fuerit, excepta tamen adulterina et sacrilega.

80 *Ibid.* (*Coll., n. cit.*).

The Code distinguishes between a dispensation from a diriment impediment granted either in virtue of ordinary power (such a one is contained in canons 1043–1045) or of power delegated by general indult (such as our Ordinaries enjoy by the decree of April 25 and Aug. 2, 1918) and a dispensation granted by a rescript in a particular case. The former implicitly *legitimates* the offspring, whether born or only conceived, of the dispensed parents, provided it be not adulterine or sacrilegious.[81]

By a special favor of the Sovereign Pontiff, of course, sacrilegious and adulterous offspring can be legitimized. But a rescript as such issued for a particular case has not the effect of legitimating children of any kind of illegitimacy, unless this effect is explicitly mentioned in the rescript. As to the different kinds of illegitimacy, see can. 1114 f. An individual case is hardly imaginable as long as the general indult of April 25 and Aug. 2, 1918, lasts. But when it shall cease, the Ordinaries will have to apply for single cases and then our canon takes full effect. The S. Cong. Sacrament. has special formularies for legitimation, which are not identical with those required for dispensations, and therefore the executor of such a rescript should carefully study its wording.

ERROR IN DISPENSATION

Can. 1052

Dispensatio ab impedimento consanguinitatis vel affinitatis, concessa in aliquo impedimenti gradu, valet,

81 S. O., Dec. 12, 1748, ad 1; July 8, 1903 (*Coll.*, nn. 368, 2171). The clergyman who applies the dispensation may, according to previous decisions, *declare* the act of legitimation in the following words: "*Eadem auctoritate prolem sive susceptam sive suscipiendam legitimam decerno.*" Cfr. Leitner, *l. c.*, p. 455.

licet in petitione vel in concessione error circa gradum irrepserit, dummodo gradus revera exsistens sit inferior, aut licet reticitum fuerit aliud impedimentum eiusdem speciei in aequali vel inferiore gradu.

A dispensation from the impediment of consanguinity or affinity, granted for a certain degree, is valid even though a mistake was made concerning the *degree* in the petition or concession, provided that the real degree be inferior to the one which was mentioned. It is valid also though an *impediment has been concealed in the petition, provided it be of the same species* and of an equal or inferior degree.

Two cases may illustrate this canon. James and Gemma are actually related in the third degree (*i. e.,* second cousins), but the petition for a dispensation was worded in such a way that the second degree could be read into it (*i. e.,* that they were first cousins). A dispensation was granted from the impediment of consanguinity in the second degree of the collateral line, whilst actually it was needed only for the third degree. The dispensation is valid.[82]

The second clause of our text concerns an *impediment that is concealed,* but of the same species as the one for which a dispensation is asked. For instance, James is related to Gemma not only in the third degree, but also, on account of common progenitors, in the second degree; therefore there are two impediments. Now if the latter was duly stated, but the former concealed or forgotten, the dispensation is valid. But if a dispensation would be asked and granted from affinity instead

82 The Const. of St. Pius V, "*Sanctissimus,*" of Aug. 20, 1566 (*Coll. P. F.,* Vol. I, p. 212) admitted the validity of a rescript even if the more distant degree was expressed in the petition, provided the real degree was the first.

of consanguinity, it would be invalid, and the so-called *Perinde valere* rescript would have to be requested, to make the previous rescript valid.[83] Such a procedure would also become necessary if instead of the direct line of affinity, the collateral line had been stated in the petition.

Attention may here be drawn to can. 47, which renders good service when a mistake has been made in spelling or writing the name of the petitioner. If the names are misspelled, the rescript is nevertheless valid so long as the parties can be properly identified.

When a rescript is asked from the S. C. of Sacraments, or from the Holy Office (in matters of disparity of cult and mixed religion), the petitioners must state their baptismal and family names as well as the name of the diocese to which they belong, their age and religion.

In cases of mixed religion the petition is made in the name of the Catholic party only.

It is advisable to use the typewriter for names. If the petition is directed to the S. Poenitentiaria, fictitious names are used, but the impediments must be clearly described as to species, number, and degree.

IMPLIED DISPENSATION FROM THE IMPEDIMENT OF CRIME

CAN. 1053

Data a Sancta Sede dispensatio super matrimonio rato et non consummato vel facta permissio transitus

83 The decree *perinde valere*, properly so-called, is a declaration issued in case the first rescript has already been expedited, and decrees it to be valid, just as if everything had been properly expressed (*valere, perinde ac si ab initio omnia fuissent recte expressa).* This rescript revalidates the favor granted and exerts its force from the date when the favor was first granted, provided no new defect or impediment has occurred in the meanwhile. Cfr. Putzer, *Comment.*, ed. 4, pp. 25, 95.

ad alias nuptias ob praesumptam coniugis mortem, secumfert semper dispensationem ab impedimento proveniente ex adulterio cum promissione vel attentatione matrimonii, si qua opus sit, minime vero dispensationem ab impedimento de quo in can. 1075, nn. 2, 3.

A dispensation granted by the Holy See from marriage ratified and not consummated, or permission given to marry again on account of the presumed death of the other spouse, always includes a dispensation from the impediment arising from adultery with promise of, or attempt at, marriage (by civil act), if there be need of such, but not from the other two impediments of crime (can. 1075, n. 2, 3).

The occasion for this enactment, as may be inferred from a decree of the S. C. of Sacraments,[84] was this: Two parties had received a dispensation from a ratified marriage, the papers attesting their free status on account of the presumed death of one party, and were married in church after having contracted a civil marriage with another party with whom they had intercourse during the first marriage. Take a case that may occur at any time. James is supposed to have been killed in war, and his wife Gemma, tired of waiting until the way is fully cleared, obtains a document certifying to her free status, but omits to state in the petition that she committed adultery with Brutus whilst her husband was still alive and that she contracted a civil marriage with Brutus before permission to remarry had been issued. Now after the permission has been granted, they wish to get married in church. In such a case, the canon says, the permission granted includes a dispensation from the impediment of crime of the first kind. But if Gemma had

84 June 3, 1912 (*A. Ap. S.*, IV, 403).

killed her husband or caused him to be killed, and committed adultery with Brutus besides; or if Brutus and Gemma had plotted together against the life of James and the plot resulted in his death, the permission granted would not include a dispensation from that twofold crime.

Here is another similar case. James and Gemma had their marriage declared null by the Holy See because of alleged impotency or fear. The marriage had been valid, though it was never consummated. Gemma, still being the wife of James, had intercourse with Brutus and promised him to marry him after the dissolution of her union with James. Now in the petition for solution this impediment of crime was not mentioned. Therefore, because of the impediment of crime, the marriage of Gemma and Brutus was invalid, even though it had been solemnized in church. But the Code says that dispensation from a ratified marriage also includes dispensation from the impediment of crime of the first species, and therefore the union of Gemma and Brutus is legal and valid.

REASONS FOR DISPENSATIONS

CAN. 1054

Dispensatio a minore impedimento concessa, nullo sive obreptionis sive subreptionis vitio irritatur, etsi unica causa finalis in precibus exposita falsa fuerit.

A dispensation granted from a minor impediment is not vitiated by the fact that a falsehood has been expressed or the truth suppressed in the petition, even though the sole final cause alleged be false.

Note the term "*minor impediment.*" Major impediments are excluded from the benefit of this canon. The

subreptitious or obreptitious petition and consequent grant may not be extended to other rescripts,[85] as this favor is attached only to marriage, on account of its public character and the welfare of souls involved.

In order to understand the text more thoroughly it must be remembered that the Sovereign Pontiff alone (to the exclusion of Ordinaries who have faculties) can dispense without cause in matters entirely subject to his legislative and judiciary power. But as dispensations are considered "a sore on the law," it is to be presumed that the Apostolic See does not grant favors without a cause. Therefore, as an instruction of the S. C. P. F. says,[86] dispensations should not be granted without legitimate and weighty reasons, and the graver the impediment, the weightier the reason required for a dispensation. The *Normae Peculiares for the S. C. of Sacraments*[87] declare that all dispensations from minor impediments are granted *for reasonable motives approved by the Holy See.*

A motive may be either the *final* one, which alone determines and moves the grantor to grant the favor; or it may be an *impelling* cause, *i. e.,* one that helps to move the grantor. One final cause (*causa motiva*) is sufficient for obtaining a dispensation. But sometimes one impelling cause (*causa impulsiva*) is insufficient, whereas several of the same kind amount to a final cause. Hence it is that different reasons for granting dispensations have been "canonized" or formally approved by the Roman Court, and the above mentioned instruction of the S. C. P. F. exhorts petitioners to mention several reasons, if possible. With regard to minor impediments any reason, if accepted, is sufficient and the dispensation is valid, even though the final cause alleged in the pe-

85 Cfr. can. 42.
86 May 9, 1877 (*Coll.,* n. 1470).
87 *A. Ap. S.,* I, 92 (P. II, c. VII, art. 3, n. 21).

tition be false. For the S. C. of Sacraments grants these dispensations "*ex motu proprio et ex certa scientia,*" which clause revalidates all subreptitiously or obreptitiously obtained rescripts.

The *reasons* given in the instruction of S. C. P. F. are the following:

(1) *Angustia loci* or smallness of the place or town (not parish).[88] This reason can be alleged by a girl living in a place with less than 1500 inhabitants, because in such a small place it is difficult for a girl — not a widow — to find a husband of equal social standing.

(2) *Aetas feminae superadulta,* or relatively advanced age of the girl, if she is more than twenty-four years old.

(3) *Deficientia aut incompetentia dotis,* if a woman has no dowry or property, and a relative would marry or endow her under certain conditions.

(4) *Lites super successione bonorum iam exortae vel earundem grave aut imminens periculum,* which would be the case if the quarrel could be settled by a marriage between relatives or if the husband *in spe* were the only man who could settle a lawsuit concerning property or inheritance.

(5) *Paupertas viduae,* poverty in the case of a widow, especially if she has many children.

(6) *Bonum pacis,* if it is possible by a marriage to settle family or feudal quarrels and remove long-standing enmities.

(7) *Nimia suspecta periculosa familiaritas,* too long

88 S. C. C., Dec. 16, 1876 (*Coll. P. F.*, n. 1463): "*angustiam loci non esse desumendam a numero focorum* [the reading in the text: *locorum* is a manifest mistake] *cuiusque parochiae, sed a numero focorum cuiusque loci vel etiam plurium locorum, si non distent ad invicem ultra milliare.*" A *focus* or *foculare* signifies a home or hearth or family; a small place is one not having more than three hundred families, and taking a family to consist of five members, we have the number 1500 given above.

courtship and great intimacy, which might cause suspicion or scandal.

(8) *Copula cum consanguinea, praegnantia ideoque legitimatio prolis,* which requires marriage in order that the damage be repaired and disgrace averted.

(9) *Infamia mulieris,* ill fame of the woman, caused by the fact mentioned under n. 7, even though she be innocent.

(10) *Revalidatio matrimonii,* if a marriage has been contracted in the prescribed form and in good faith.

(11) *Periculum matrimonii mixti vel coram acatholico ministro,* danger of a mixed marriage, which is present especially in small congregations and in communities with a preponderantly non-Catholic population.

(12) *Periculum incestuosi concubinatus,* when near relatives live under the same roof and in imminent danger of concubinage.

(13) *Periculum matrimonii civilis,* danger of a civil marriage if a dispensation be denied.

(14) *Remotio gravium scandalorum et cessatio publici concubinatus;* serious scandal and cessation of public concubinage are generally connected, and here supposed to be existing.

(15) *Excellentia meritorum,* if one has deserved well of the Catholic faith by combating its enemies in word or writing, or by generosity, or conspicuous learning and virtue.

These are the usual grounds (though not all) upon which a dispensation is granted. And the aforesaid instruction admonishes those who grant dispensations by delegated power to proceed properly and in a becoming manner.

EXECUTION OF DISPENSATIONS

CAN. 1055

Dispensationes super publicis impedimentis Ordinario oratorum commissas, exsequatur Ordinarius qui litteras testimoniales dedit vel preces transmisit ad Sedem Apostolicam, etiamsi sponsi, quo tempore executioni danda est dispensatio, relicto illius dioecesis domicilio aut quasi-domicilio, in aliam dioecesim discesserint non amplius reversuri, monito tamen Ordinario loci in quo matrimonium contrahere cupiunt.

The text refers only to *public impediments,* from which a dispensation was indeed granted by the Holy See, but by rescript forwarded to the Ordinary. For it is the latter who is generally — exceptions are not frequent, though possible — set up as *executor.* As such the Ordinary must, as stated elsewhere,[89] examine the rescript closely, to see whether it is genuine and whether he is an *executor necessarius* or *voluntarius.* But it is safe to say, in view of can. 1054, that he need not examine the existence of the reasons alleged, if dispensations from minor impediments are the object of the rescript. There is only one reason that might justify the executor in withholding execution, *viz.,* unworthiness of the petitioner, and in that case the Holy See must be immediately informed.[90] If a dispensation from a major impediment was granted by the Holy See with *clausulae* like this: "*Si preces veritate nitantur,*" or, "*si constiterit,*" or "*constito,*" then the Ordinary is an *executor voluntarius* or *mixtus,* who must verify the reasons before he "*fulminates*" the dispensation. If absolution from censures is

89 Cfr. Vol. I of this Commentary, p. 141.

90 *Ibid.,* p. 143.

required, he has to impart it, either personally, or through the pastor or confessor.[91]

Our text supposes that a valid and properly drawn up rescript has been forwarded to the Ordinary, who sent either a recommendation (*litteras testimoniales*) or a petition for it to the S. C. of Sacraments. A recommendation may be sent if the Ordinary doubts his own competency,[92] and therefore does not care to send a petition himself, but lets the petitioners do so. As a general rule, if the petitioners are his subjects by reason of domicile or quasi-domicile, the Ordinary forwards the petition and in that case is called *Ordinarius oratorum* and receives the dispensation. He may execute the dispensation even though the petitioners (*sponsi*) have given up their domicile or quasi-domicile in his diocese at the time the dispensation is to be used, and have gone to another diocese with the intention of not returning.

The Ordinary who executes the rescript should inform the Ordinary in whose diocese the wedding takes place.[93] Thus if James and Gemma, dwelling in the diocese of St. Joseph, were granted a dispensation by the Holy See, and the rescript was sent to the Ordinary of that diocese, supposing the parties have meanwhile removed to Springfield, Mo., in the diocese of Kansas City, the bishop of St. Joseph or his vicar-general may send the rescript to the Ordinary of Kansas City with the words: "As executor of the rescript enclosed we hereby execute the dispensation granted by the Holy See," followed by the

91 Cfr. Putzer, *l. c.*, p. 106 f.

92 A doubt might arise from uncertainty whether or not the petitioners belong to the diocese; this doubt was removed by the S. O., July 6, 1896 (*Coll.*, n. 1945) by abolishing the former condition: *intra fines dioecesis.*

93 The rescript is generally addressed to the *Ordinarius*, for instance, *St. Josephi;* if it is addressed to the *Episcopus*, the bishop and not the Vicar-general must attend to the matter.

name of the executor. The fee which is usually fixed and written on the back [94] of the rescript, belongs to the executor, in our case the Ordinary of St. Joseph.

CHARGES FOR DISPENSATIONS BY RESCRIPT

CAN. 1056

Excepta modica aliqua praestatione ex titulo expensarum cancellariae in dispensationibus pro non pauperibus, locorum Ordinarii eorumve officiales, reprobata quavis contraria consuetudine, nequeunt, occasione concessae dispensationis, emolumentum ullum exigere, nisi haec facultas a Sancta Sede expresse eis data fuerit; et si exegerint, tenentur ad restitutionem.

It is not necessary to defend the right of the Apostolic See to a fair remuneration for the work involved in issuing papal documents. Any one who has a little business capacity will see that a court like the Roman needs a large and expensive machinery. Many buildings and persons compose the Apostolic Chancery, and the expenses of conducting it run high, especially at the present time when the cost of living for the officials is steadily increasing. It is not true, as we sometimes hear, that there are "too many lazy employees." The S. C. of the Sacraments, the one we are dealing with here, is not only overburdened with work, but short of help. We will add that the taxes demanded do not involve simony, but their payment is merely an act of deference and gratitude to the Apostolic See in recognition of the favor granted, and an act of justice towards those who are occupied with

94 On the back there are generally three kinds of fees to be noticed in the following order:
Taxa, Libelli (in Italian lire; 1 lira = about 18 cents).
Executoria, Libelli (for the executor of the rescript).
Agenzia, Libelli (for the Agent in Rome).

the tedious labor necessary for the conduct of the chancery. Besides it must be remembered that dispensations are "a sore on the law," which must be repaired, and marriages with impediments must be prevented whenever possible.

Here it will not be amiss to state *some rules* which are in force at the Roman Court with regard to *fees* or *taxes*. The *Normae Communes*[95] published in connection with the Constitution "*Sapienti consilio*" of Pius X (1908), lay down the following rules:

(1) For matrimonial dispensations the rules prevailing in the Apostolic Dataria, the S. Poenitentiaria, and the S. C. Concilii are still in force. Their scale of taxation is approximately the following. Taking the annual surplus of income over necessary expense as a standard, those are *really poor* whose net annual profit after all expenses are counted off amounts to about $25. Those whose annual net surplus amounts to about $80, are *quasi-poor*. All others are not to be regarded as poor. The really poor pay no *componenda*[96] or tax, but only a moderate fee besides the postage. The quasi-poor pay $2 in addition to the fee imposed on the really poor. All others must pay a certain percentage, reckoned in proportion to the capital and their net yearly revenue. For instance, one who has an income of $10,000, of which $400 are reckoned as net annual profit, pays a certain per cent of that profit, according to the importance of

95 Cfr. *A. Ap. S.*, I, 55 f.

96 Cfr. Gasparri, *De Mat.*, n. 315; Leitner, *l. c.*, p. 422 f. A *componenda*, also called *compositio*, is a fine to be paid for dispensations from consanguinity and affinity and is expended for works of charity (*in pias causas*). A *taxa* or tax, properly so called, is a fee for defraying the expenses of the Roman congregations and tribunals (cf. Feije, *l. c.*, n. 691 f.). When I received my American passport, I had to pay $1 to the American Consul General at Zurich in Switzerland, and an additional $1 for the signature of each consul of the different countries through which I had to travel.

the impediment and the character of the reasons advanced. We mention this rule here to give a clue to Ordinaries who try to be conscientious in such matters.

(2) The Ordinary should secretly ask the pastor concerning the financial status of the petitioners in order to decide whether they deserve a reduction of the tax, *i. e.*, whether they are really or quasi-poor. If any of the parties concerned, or the pastor, or the Ordinary grievously offend against this rule, they are obliged to make restitution.

(3) If the petitioners maliciously refuse to pay the tax or commit fraud, and the dispensation is necessary for removing scandal or sin, the Ordinaries must mention this circumstance in the petition, and when they communicate the dispensation, admonish the parties of their duty towards the Apostolic Chancery. However, neither fraud nor error concerning the financial condition of the parties concerned in any way affects the validity of the rescript.

We deemed it necessary to set forth these facts here, though they do not bear directly on can. 1056, which refers to the charges made by the *diocesan chancery*. With the exception of a moderate fee for the expenses of the chancery, it says, the local Ordinaries or their officials are not allowed to charge anything for dispensations, unless the Holy See has expressly granted them permission to make a charge. Every contrary custom is reprobated. If a charge is made without permission, the officials are bound to restitution.

The Council of Trent [97] and the Roman Congregations [98] had strictly forbidden Ordinaries to make any

97 Sess. 24, c. 5, *De ref. mat.*

98 Thus the S. O., Jan. 12, 1769 (n. 472, II, 3): "*ut eaedem dispensationes gratis omnino et absque ulla prorsus mercede impertiantur*"); S. C. C., July 3, 1634; S. C. P. F., Jan. 14, 1716 (*Coll.*, n. 2188).

charge, especially in the shape of a fine, for dispensations granted in virtue of faculties received from the Holy See. Even the bishops of Ireland, who received but a bare pittance from their clergy, were not permitted to exact any fees for dispensations.[99] Only the bishop of Quebec for special reasons obtained the privilege of demanding a moderate tax from rich as well as poor, according to their means, but the money had to be used for pious purposes.[1] Otherwise demanding a fee for dispensations granted in virtue of Apostolic faculties was strictly forbidden, even under pain of nullity of the dispensation.[2] However, this must not be understood literally. When a rescript bears on its back the remark: *taxa* — so much; *executoria* — so much; *agenzia* — so much, the resp. Ordinary is allowed to demand the sum-total of these fees from the parties concerned. Besides, the chancellor is entitled to demand a moderate fee for chancery expenses and postage.

A difficulty arises concerning the faculties granted to our Ordinaries by the decrees of April 25 and Aug. 2, 1918. The latter prescribes, as stated under can. 1048, that Ordinaries have to render an account of the dispensations granted and, on the same occasion, pay the amount due to the Holy See. Here Ordinaries are plainly allowed to collect the usual fee demanded by the Holy See, because they are commanded to forward the money to Rome; for if they were not permitted to collect the tax usually imposed by the Roman Court, they would have to pay the *iura* demanded by the Holy See out of their own pockets, which cannot be the intention of Rome.

99 S. C. C., *l. c.*; S. C. P. F., Feb. 12, 1821 (*Coll.*, n. 755).

1 S. C. P. F., July 4, 1793 (*Coll.*, n. 616).

2 *Ibid.*

As to *restitution,* note that the text says that it becomes obligatory only if the Ordinaries have *exacted* (*exegerint* [3]) money. A voluntary contribution does not oblige to restitution.

MENTION OF DELEGATION WHEN DISPENSING

CAN. 1057

Qui ex potestate a Sede Apostolica delegata dispensationem concedunt, in eadem expressam pontificii indulti mentionem faciant.

Those who grant dispensations in virtue of delegated power from the Apostolic See, shall mention the papal indult when using it.

This text cannot be construed as if the mention of delegation affected the validity of a dispensation. In matter of fact it affects only the licitness of the same;[4] otherwise the lawgiver would have appended an invalidating clause. But it must be expressed in the use of both a general and a particular indult, and all the *clausulae* must be observed as far as circumstances permit.[5]

3 Bened. XIV, "*Ad tuas,*" Aug. 8, 1748, demanded the insertion of this clause in every rescript under penalty of nullity of the dispensation. This shows how carefully even the appearance of simony must be avoided.

4 The Holy Office (June 15, 1875; *Coll.,* n. 1444) has limited the import of this clause to licitness.

5 *Ibid.*

CHAPTER III

PROHIBITIVE IMPEDIMENTS

The Code mentions only three prohibitive impediments: vow, legal adoption, and mixed religion. However, it enumerates five different vows, and if these are taken as specifically distinct, there are *seven* prohibitive impediments, which we shall now proceed to explain.

THE IMPEDIMENT OF VOW

CAN. 1058

§ 1. Matrimonium impedit votum simplex virginitatis, castitatis perfectae, non nubendi, suscipiendi ordines sacros et amplectendi statum religiosum.

§ 2. Nullum votum simplex irritat matrimonium, nisi irritatio speciali Sedis Apostolicae praescripto pro aliquibus statuta fuerit.

§ 1. Marriage is rendered illicit by the simple vow not to marry, the vow of virginity and perfect chastity, the vow to receive sacred orders or to embrace the religious state.

§ 2. No simple vow invalidates a marriage unless the Apostolic See has made a special enactment to that effect.

The final clause is plainly intended to safeguard the constitutions of the Society of Jesus, for whom Gregory XIII, in his constitution "*Ascendente Domino*," May 25, 1584, declared that the simple vows taken by the scho-

lastics after two years' novitiate have the same invalidating effect as if they were solemn.[1]

The Code distinguishes five different vows. But it would be difficult to establish a real distinction between the vow of virginity and the vow of perfect chastity. The object of the vow of virginity is the integrity of the body, and though it may be taken for the specific purpose of obtaining the aureole promised to virgins,[2] bodily integrity without perfect chastity is not easily conceivable. We are aware that internal acts are distinct from external acts and that while merely internal acts against chastity may not destroy the integrity of the body, perfect chastity includes both internal and external acts and therefore also the vow of virginity. It is not surprising, therefore, that the Decretals never expressly mention the vow of virginity, but only the simple vow of chastity or not marrying. We would not, however, deny that the vow of chastity may be taken after virginity has been lost. For instance, a person once married may make the vow of chastity; but whether it may really be called perfect chastity, if the marriage rights had been made use of, is another question. Canonists generally allege only four species to the exclusion of the vow of virginity. In our commentary we shall include the vow of virginity in that of perfect chastity or celibacy.[3]

1. *The Simple Vow of Perfect Chastity,* whether absolute or conditional, prohibits marriage, because marriage is opposed to the object of perfect chastity. On the other hand, a promise made to God to observe chastity requires

1 Simple religious vows had been unheard of up to that time, and in order to protect the Society of Jesus against attacks the Pope issued this Constitution.

2 Cfr. Apoc. 14, 4; Putzer, *Comment.,* p. 161.

3 Wernz, *l. c.,* IV, Vol. II, n. 564, p. 427, justly observes that the distinction between the vow of celibacy and that of virginity has little practical value and the latter differs from the former only in regard to the first *opus carnale.*

that all danger and proximate occasion of breaking the vow be removed. Now marriage would enhance the danger and render either the vow or the marriage rights illusory. Therefore the vow of perfect chastity and marriage exclude each other. However, as the Church accepts this vow only as *simple,* not irrevocable, which would imply full surrender of one's self, it does not render marriage invalid.[4]

2. The *Vow of Celibacy* is diametrically, though only contradictorily, opposed to marriage and renders the latter illicit; for although this vow is opposed to marriage, it does not imply that the right to one's body has been completely given up; it has merely been suspended.

3. The *Vow of Receiving Major Orders,* by a positive law of the Church,[5] renders marriage illicit because by it one would take upon himself a state of life which, according to the same law, is incompatible with the state of higher orders, requiring celibacy.

4. The same must be said concerning the *Vow of embracing the Religious State,* although this state not only by positive but also by natural law is incompatible with marriage. By religious state must be understood, according to our Code, every religious institute with solemn or simple, temporary or perpetual vows, or, in other words, every organization whose members pronounce the three religious vows and live a common life.

The *effect* of these vows is, therefore, generally speaking, to render marriage grievously illicit. In particular these differences between the single vows may be noticed:

(1) The *vow of perfect chastity,* if not dispensed from, retains its force even in the married state, as far as compatible with the rights of the other party.[6] Hence

4 Sanchez, *l. c.,* l. VIII, disp. 11, n. 4; Feije, *l. c.,* n. 559, p. 436; Wernz, *l. c.* IV, Vol. II, n. 566.

5 Cc. 1, 3, X, IV, 6.

6 One who, knowing of the vow, would marry such a person, would

a person bound by the vow of chastity is not allowed to demand the *debitum coniugale,* though he may render it at the demand of his partner. Yet no obligation attaches to the vow which would compel the person bound by it to enter a religious order, if possible, for an obligation cannot be stretched further than the intention of him who incurs it. And the intention of embracing the religious life is not included in the vow of chastity.[7] Besides, unless the vow of chastity is dispensed from, or was conditional, or made for a limited time only, it is not extinguished by an illicit marriage and consequently revives after the dissolution of the marriage tie.

(2) The *vow of celibacy* is broken by the act of contracting marriage, and therefore we cannot understand the opinion of some authors[8] who would prohibit one bound by this vow from contracting a second marriage, except as far as the moral obligation is concerned. As to the *debitum coniugale,* this may be not only rendered, but also demanded, because the object of the vow was marriage, and nothing else.

(3) The *vow of receiving sacred orders* as well as that of embracing the *religious life* prohibits the consummation of marriage, but after consummation the party bound by the vow is allowed both to render and to demand the *debitum.* As long as the marriage is not consummated the obligation remains, and it revives when the party is freed from the marriage obligation.[9] These effects show how anomalous is the state of marriage when no dispensation has been obtained from this vow.

commit a grievous sin. Sanchez, *l. c.,* l. VII, disp. 11, n. 11.

7 Sanchez, *l. c.,* l. IX, disp. 34, n. 3; Feije, *l. c.,* n. 559.

8 Cfr. Feije, *l. c.,* n. 562; Wernz, *l. c.,* IV, Vol. II, n. 566.

9 Feije, *l. c.,* n. 560 f.

DISPENSATION FROM VOWS

First of all it should be noted that of these five vows only two are *reserved to the Apostolic See, viz.,* the vow of perfect and perpetual chastity and the vow of embracing the religious life with solemn vows, provided these vows were made absolutely and after the 18th year of age had been completed.[10] A vow is *absolute* if it has attached to it no condition as to time or circumstances or the matter itself. When a condition is attached, the vow is *conditional.* Thus it would be a conditional vow were one to promise: "I will enter such and such an order, provided it has a monastery in my country, or if I am found fit for it, and none other." If he is subsequently received into that order, and dismissed from it, the conditional vow is fulfilled, and no dispensation is needed to enable him to marry. If a secular Tertiary of the Franciscan Order would imagine that his profession involved perfect and perpetual chastity, the vow would be incomplete and no dispensation would be required.[11] For the two vows reserved to the Holy See special faculties are needed. If they are private and secret, they fall under the jurisdiction of the S. Poenitentiaria; as the faculties granted for such cases are not revoked by the decree of April 25, 1918, Ordinaries may continue to use and subdelegate them to their clergy. The confessor in the act of sacramental confession, or the pastor outside the confessional but for the internal forum only, (we suppose the impediment to be occult, as it generally is) must impose other good works and monthly confession, for there is question here rather of a commutation than of a pure dispensation.[12] The works of penance enjoined should be adapted to the condition of the party as well as pro-

10 Can. 1309.

11 Cfr. Leitner, *l. c.,* p. 344.

12 Putzer, *l. c.,* p. 162 f.

portionate to the reasons for which the dispensation is granted. These *reasons* may arise from the imperfect act, the vow itself (rashness, ignorance, mental depression), moral and physical weakness, and family circumstances.[13] Let it be added, however, that a dispensation for one marriage does not imply a dispensation for several marriages; a new dispensation is required for each. A dispensation from the vow of entering a religious order or congregation, if given for the sole purpose of enabling the subject to remain in the world, does not include permission to contract marriage.[14] The *vows of celibacy* and *virginity* and that of *receiving holy orders* are *not reserved,* and may therefore be dispensed from by the Ordinary in virtue of his ordinary power, which he may communicate to others. If a dispensation is granted, the obligation ceases entirely and forever, and hence it may be supposed to be given for more than one marriage.

LEGAL ADOPTION

Can. 1059

In iis regionibus ubi lege civili legalis cognatio, ex adoptione orta, nuptias reddit illicitas, iure quoque canonico matrimonium illicitum est.

The Code twice mentions adoption as an impediment to marriage; once in this canon, and again in can. 1080, thus introducing a distinction between legal adoption simply as an impedient and as an invalidating impediment. Our can. 1059 states that in countries where relationship aris-

13 We hold with Sanchez (*l. c.*, l. VII, disp. 11, n. 12) that if a penitent would ask his pastor or confessor whether a marriage contracted under such a vow is valid, the latter would be entitled and obliged to answer in the affirmative, for this is the teaching of the Church and requires no mental restriction.

14 Wernz, *l. c.*, IV, Vol. II, n. 570 f.; p. 432.

ing from legal adoption is a prohibitive impediment by civil law, it is so also by Canon Law. This is an instance of what is called "canonization" of a civil law by the Church. For further explanation we refer the reader to can. 1080, which treats legal adoption as a diriment impediment.

MIXED MARRIAGES

The distinction between the impediments of disparity of worship and mixed religion was hardly known until Huguccio, in his gloss to the Decree of Gratian,[15] and especially St. Thomas,[16] commenced to distinguish between the two and assigned a prohibitive character to the latter. The so-called Reformation of the XVIth century led to a vast increase in the number of "mixed" marriages, though the Church always resisted such unions, as many papal constitutions and decisions of the Roman Court prove.[17]

MIXED RELIGION

Can. 1060

Severissime Ecclesia ubique prohibet ne matrimonium ineatur inter duas personas baptizatas, quarum altera sit catholica, altera vero sectae haereticae seu schismaticae adscripta; quod si adsit perversionis periculum coniugis catholici et prolis, coniugium etiam lege divina vetatur.

The Church most severely forbids everywhere marriages between two baptized persons, one of whom is a Catholic and the other a member of a heretical or schis-

15 Ad c. 16, C. 28, q. 1, *s. v. haereticis.*

16 Lib. IV, Dist. 39, q. 1, art. 1, ad 5.

17 See the quotations in Card. Gasparri's edition of the Code.

matic sect; if there is danger of perversion for the Catholic party or the offspring, such a union is forbidden also by divine law.

Here we have a concise statement of the reasons why the Church forbids mixed marriages.

(1) These *reasons* are found in a well-known instruction of Cardinal Antonelli, published in 1858, and in an instruction issued to the Oriental bishops by the Holy Office in 1888.[18] They are the following:

(a) The detestable communion in sacred matters (*flagitiosa in divinis communio*), which results in such cases from the sacramental character of marriage and which is strictly forbidden;

(b) The *danger of perversion* to the Catholic party arising from indifference in religious matters;

(c) The irreligious or at least *careless education of children* brought up in the atmosphere of religious indifference.

Since the Church claims to be the true Church of Christ, and since the Catholic faith is divine, any wilful and unwarranted exposure of it to the danger of loss is forbidden by divine and, we may add, also by the natural law. For the natural law commands us to strive for our last end by employing means proportionate to it. In the supernatural order this end can be attained only by divine faith. Hence a natural and a supernatural premise compel the conclusion that to endanger the bulwark of salvation needlessly is contrary to divine and to the natural law.[19] It is not necessary to prove the evil effects of indiscriminately contracted mixed marriages by statistics. The Code admits that they are real.

18 Sec. Status, Nov., 1858; S. O., Dec. 12, 1888 (*Coll. P. F.*, nn. 1169, 1696); Leo XIII "*Arcanum*," Feb. 10, 1880.

19 Sec. Status, March 27, 1830 (*Coll. P. F.*, Vol. I, p. 474).

(2) The *impediment* of mixed religion is merely prohibitive and was established by *ecclesiastical law.* But there is no contradiction between the general prohibition which arises from the natural and from divine law on the one hand, and the positive prohibition of the Church on the other. For the general obligation of avoiding all danger to the faith and to salvation is not neutralized by the positive sanction of the Church, but this sanction is merely a juridical formulation of the divine law. The Church in thus formulating that law did not mean to dispense from the precautions required by the natural and by divine law. Hence the positive law only is dispensed from, whilst the obligations attendant upon the natural and divine law remain.[20] We might therefore call the dispensation from this impediment a conditional one, *i. e.,* dependent upon the fulfillment of the required conditions. But we must not be understood as saying that a dispensation becomes valid only *when* the conditions are fulfilled. No, the dispensation is valid from the date when it is granted, but the obligation of complying with the conditions always remains, and no human power can remove it. From this again it appears how seriously the Church regards mixed marriages.

(3) The *extent* of this impediment is determined by the *difference of religion,* which regards Christian denominations only. The foundation is *Baptism,* presumed to be valid. And herein lies the specific distinction between

20 Wernz (*l. c.,* IV, Vol. II, n. 583, p. 441) appropriately says: "*Quodsi prohibitio legis divinae in casu particulari non est sublata, a nullo potestate humana licita et valida dispensatio super impedimento mixtae religionis, quatenus nititur iure divino, concedi potest. At si prohibitio legis divinae in casibus particularibus cessavit, ii scriptores modum excesserunt, qui vel ipsi Romano pontifici a manente lege ecclesiastica contra mixta matrimonia absolute et universaliter lata potestatem dispensandi negarunt. Eo enim in casu manet sola lex . ecclesiastica, super qua ex iusta causa certe licite et valide ab Ecclesia dispensari potest.*"

this impediment and that of disparity of worship. Baptism also furnishes the reason why these two impediments are classified differently, that of mixed religion belonging to the forbidding, whereas disparity of cult is numbered among the diriment impediments. Since by baptism one radically becomes a subject of the Church,[21] baptized non-Catholics are not outside her pale. Furthermore, as Christian denominations are now scattered broadcast everywhere, it would be a difficult matter to set up a diriment impediment, or as it were, an insurmountable barrier between Catholics and Protestants.[22] But a Catholic may not on that account licitly marry a member of a heretical or schismatic sect.

Who are *heretics?* A declaration of the Holy Office [23] with regard to mixed marriages in Holland may help us to understand the term better. It says that all those are called heretics who, though baptized by Catholics, were educated in heresy before they were seven years of age; also all those educated by heretics, although not thoroughly imbued with heretical doctrines; likewise those who have fallen into the hands of heretics and adhere to their tenets; those who have apostatized from the Catholic faith and joined a heretical sect; and those born of and baptized by heretics who have grown up without making formal profession of heresy or without any religion at all. However it must not be overlooked that our text says: "*sectae haereticae adscripta*," *i. e.*, the non-Catholic party must be a member of a heretical sect, or at least must have adhered to a sect some time previously to the marriage. The Holy Office has expressly declared that those can not be regarded as heretics who have rejected the Catholic

21 *Trid.*, sess. 7, can. 7, *de bapt.*

22 Bened. XIV, "*Matrimonia.*" Nov. 4, 1741; S. O., Dec. 12, 1888 (*Coll. P. F.*, n. 1696 ad 1).

23 S. O., April 6, 1859 (*Coll.*, n. 1174).

faith but have not joined a false religion or heretical sect,[24] and that *Freemasons* who belong to a condemned sect are not to be classified as heretics.

Schismatics are all those who have separated themselves from the unity of the Church and are certainly to be considered heretics.[25] Pure schism now-a-days is almost impossible. The extant decisions on that point have reference to Oriental schismatics, but they apply to all who have heretical tendencies, whoever they may be.[26]

What about *doubtful Baptism?* The Holy Office has declared more than once that a doubtful Baptism must be considered valid with regard to marriage. The *rules* to be followed in such cases are the following:

(a) If the ritual of the heretical sect prescribes Baptism, but without the required matter and form, each single case must be treated on its own merits.

(b) If the resp. sect baptizes validly, according to its ritual, the Baptism is to be considered valid. If there is room for doubt, even in the first mentioned case, the Baptism must be regarded as valid in reference to marriage.

(c) If it is evident from actual custom that Baptism in a sect is invalid, then marriage, too, is invalid if contracted between one thus invalidly baptized and a Catholic, because of the impediment of disparity of cult.[27]

24 S. O., Jan. 30, 1867 (*Coll.*, n. 1300).

25 Cfr. can. 1325, § 2: One who refuses to be subject to the Roman Pontiff or to communicate with the members of the Church subject to him, is a schismatic. A stubborn refusal of obedience to the Roman Pontiff may practically coexist with the Catholic faith, but it is next to impossible to imagine a theoretical schismatic without a taint of heresy.

26 S. O., Jan. 3, 1871; Dec. 22, 1888; S. C. P. F., Feb. 18, 1783 (*Coll.*, nn. 1362, 1696, 562).

27 S. O., Nov. 17, 1830; Sept. 9, 1868 (*Coll.*, nn. 821, 1334): "*generatim loquendo, ut christiani habendi sunt ii de quibus dubitatur an valide baptizati fuerint.*" S. O., Dec., 1872 (*Coll.*, n. 1392): "*Utrum baptismus dubius censendus sit validus in ordine ad matrimonium etiam in eo sensu, quod invalidum sit matrimonium inter haereticum dubie baptizatum et infidelem propter impedimentum dis-*

Of special interest for our country is the answer of the Holy Office to the Bishop of Savannah.* The first point is nothing else but a reaffirmation of the principle stated above, namely, that the presumption is in favor of the validity of Baptism with regard to marriage. But the bishop wished to know further when the *presumption* of validity might be duly applied. The answer was: (α) If the parents belong to a sect which rejects Baptism, the latter is not to be presumed; (β) The same holds good if the sect rejects infant Baptism (as, *e. g.*, the Baptists do). (γ) Also if the parents belong to no sect whatever, but are absolutely indifferent in religious matters. (δ) If, on the other hand, the parents belong to a sect that requires Baptism and generally administers it, and if these parents were zealous in their religion, Baptism may be presumed. (ε) If only one of the parents belongs to a sect that prescribes and administers Baptism, and this one, whether father or mother, was the chief educator of the party in question, Baptism is to be presumed, provided the other parent, who was less zealous in religious observance, did not positively object. (ζ) If no presumption is admissible, the case must be examined for itself and, if the doubt remains, reported to the Holy See.

After having stated the reasons for the Church's severe prohibition of mixed marriages and explained the nature and extent of the impediment, the Code lays down the conditions under which such marriages may be permitted.

paritatis cultus." S. C. respondit: "Affirmative." S. O., July 14, 1880 (*Coll.*, n. 1536):

1. Matrimonium dubie baptizati cum non baptizata estne validum?

2. Matrimonium duorum dubie baptizatorum estne validum etiamsi sint consanguinei, affines, etc.

R. ad 1. Matrimonium esse habendum uti invalidum ob impedimentum cultus disparitatis.

Ad 2. Matrimonium habendum esse ut invalidum ob impedimentum consanguinitatis vel affinitatis.

* S. O., Aug. 1, 1883 (*Coll.*, n. 1605).

CONDITIONS UNDER WHICH MIXED MARRIAGES MAY BE PERMITTED

CAN. 1061

§ 1. Ecclesia super impedimento mixtae religionis non dispensat, nisi:

1.° Urgeant iustae ac graves causae;

2.° Cautionem praestiterit coniux acatholicus de amovendo a coniuge catholico perversionis periculo, et uterque coniux de universa prole catholice tantum baptizanda et educanda;

3.° Moralis habeatur certitudo de cautionum implemento.

§ 2. Cautiones regulariter in scriptis exigantur.

§ 1. The Church *does not dispense* from the impediment of mixed religion, unless:

1.° There be just and weighty reasons;

2.° The non-Catholic party guarantees to remove the danger of perversion from the Catholic party, and both promise to baptize and educate all their children in the Catholic faith;

3.° There be a moral certainty that the promises will be kept.

§ 2. The promises must, as a rule, be demanded in writing.

Concerning the reasons we refer to can. 1054. Any of the reasons there stated will suffice for obtaining a dispensation. Besides, the following may be mentioned as admissible: if the projected marriage be the only means by which the Catholic education of children born of a former marriage can be safeguarded; danger of civil marriage or complete apostasy from the faith; if grievous scandal can only be repaired by a mixed marriage.[28]

28 Leitner, *l. c.*, p. 350.

As to the *guarantees,* they have always been insisted upon and, as was said above, a dispensation from them is impossible, because it would violate the natural and divine law.[29]

It may surprise the reader that *two promises* are now considered as sufficient — *removal of the danger of perversion,* and the *Catholic education* of the children. This provision marks a stage in the advance of juridical precision. For these two guarantees almost entirely depend on human factors and may be effected by legal means, unless the civil law offers an obstacle, as is the case in some European countries where boys must follow the religion of the father, and girls that of the mother. This is a foolish and unjust law, which, we are glad to say, has no counterpart in America.[30] The two conditions mentioned are strictly juridico-canonical, whereas the others still mentioned in the *litterae reversales*[31] have been relegated to a special canon.

Concerning the *manner of demanding* these guarantees, the Code says that *moral certainty* must be obtained that they will be complied with, and hence they should, as a rule, be given in writing. Formerly the parties had to go before the officials of the diocesan court or before the pastor and swear and subscribe to the formula; the pastor then had to forward the papers to the chancery office.[32] Now *moral certainty* as to the fulfillment of the promises is considered sufficient, and this may be based upon the known character of the parties. But if advisable, the bishop or pastor may demand an oath of

29 S. O., June 3, 1871 ad 6; Dec. 10, 1902 (*Coll.,* nn. 1362, 2155).

30 Switzerland had a law to this effect in 1863, of which the Holy Office (Jan. 21, 1863, *Coll.,* n. 1263) complained; Prussia maintained the same attitude, and Baden also.

31 Hence these might be remodelled.

32 S. O., June 6, 1879 (*Coll.,* n. 1521).

them.[33] Broadly speaking, the promises must be made in the form of a contract or agreement which offers a moral guarantee that its stipulations will be fulfilled.[34] We may add that these promises must be demanded also when there is danger of death.[35]

CONVERSION OF THE NON-CATHOLIC PARTY

CAN. 1062

Coniux catholicus obligatione tenetur conversionem coniugis acatholici prudenter curandi.

The Catholic consort is bound prudently to procure the conversion of the non-Catholic party.

This obligation is based upon charity. It should be fulfilled *prudently,* says the Code; and hence not by force or threats. Faith is a free gift of God.

NON-CATHOLIC MINISTERS EXCLUDED

CAN. 1063

§ 1. Etsi ab Ecclesia obtenta sit dispensatio super impedimento mixtae religionis, coniuges nequeunt, vel ante vel post matrimonium coram Ecclesia initum, adire quoque, sive per se sive per procuratorem, ministrum acatholicum uti sacris addictum, ad matrimonialem consensum praestandum vel renovandum.

§ 2. Si parochus certe noverit sponsos hanc legem violaturos esse vel iam violasse, eorum matrimonio ne assistat, nisi ex gravissimis causis, remoto scandalo et consulto prius Ordinario.

§ 3. Non improbatur tamen quod, lege civili iubente,

33 S. O., Feb. 17, 1875 (*Coll.*, n. 1433).

34 S. O., June 30, 1842 (*Coll.*, n. 950).

35 S. O., March 18, 1891 (*Coll.*, n. 1750).

coniuges se sistant etiam coram ministro acatholico, officialis civilis tantum munere fungente, idque ad actum civilem dumtaxat explendum, effectuum civilium gratia.

§ 1. Even when a dispensation from the impediment of mixed religion has been given by the Church, the parties can not, either before or after their marriage before the Church, go, whether in person or by proxy, to a non-Catholic minister in the exercise of his office, for the purpose of giving or renewing the matrimonial consent.

§ 2. If the pastor knows for certain that the parties are about to violate this law, or have violated it, he shall not assist at their marriage, except for very weighty reasons, all danger of scandal being removed and the Ordinary having been consulted.

§ 3. It is not, however, forbidden for the parties to present themselves before a non-Catholic minister acting as a civil magistrate, when the civil law requires it, solely to comply with a civil formality and for the sake of civil effects.

The distinction [36] between § 1 and § 3 consists in the following: If the parties were to approach a non-Catholic minister, as such, and to ask and obtain from him the nuptial blessing, the Catholic party would acknowledge him as a lawful minister of Christ, and approve of and profess a heretical rite. This cannot be allowed because it would be an active participation in heretical functions, which is *per se* a grievous sin. But if the parties present themselves before a non-Catholic minister acting as a civil magistrate, and who does not mean to confer a blessing, the Catholic party is free from guilt, if the cere-

36 Cfr. Benedict XIV, "*Redditae sunt,*" Sept. 17, 1746; *De Syn. Dioec.*, VI, 7; S. O., Jan. 29, 1817 (*Coll.* 717).

mony is gone through merely to observe the civil law and to avoid greater evils.[37]

Attention must be drawn to the expression, "*ad matrimonialem consensum praestandum vel renovandum.*" This implies that the parties really have the intention of giving or renewing the matrimonial consent, or, in other words, desire to celebrate their marriage before a non-Catholic minister, as such, at least by the external act, although the internal consent may be absent in the Catholic party, or may be given inadvertently, or reluctantly, or out of mere courtesy. The reason of this strict prohibition is the inevitable participation in sacred things and the external approval of heretical rites to the scandal of Catholics.[38]

Note furthermore: "*sive per se sive per procuratorem.*" The matrimonial consent may be given either personally or by proxy.[39] If given by proxy, rules 68 and 72 in 6° must be observed and hence the guilty party is the one that acts through the proctor, although the latter, too, commits a grievous sin if he is a Catholic and realizes his guilt.[40]

On the other hand, both guilt and prohibition are absent if § 3 is verified. For in that case a merely civil act is performed in order to obtain civil effects. Thus, for instance, if a preacher would act merely as justice of the peace, being acknowledged as such, no matter how unctuous an exhortation he might deliver on the occasion, the

37 Cfr. *Instructio S. O. ad Ep. Osnabruck.*, Feb. 17, 1864 (*Coll.*, n. 1247), from which sect. 3 of our canon is borrowed almost verbally.

38 S. O., *ibid.*, Dec. 12, 1888 ad 7 (*Coll.*, n. 1696).

39 Cfr. can. 1088.

40 The censure mentioned in can. 2319 would not be incurred by the proxy. The term *non-Catholic minister* includes any minister of any heretical or schismatic denomination, which as such is opposed to, or rejected by, the Catholic Church. This seems to be based upon Pius IX's Const., "*Apostolicae Sedis*," 1869, I, 3.

ceremony would be a purely civil one. If the minister is not the only man in town who may act as official, the parties, after having obtained a duly issued license, may certainly be suspected of approaching him as a *minister in sacris*. The same holds good in a higher degree if in a town or city there are several different denominations, and the non-Catholic party chooses the minister of his own creed. Neither does it matter whether he is dressed as a clergyman or where he receives them, in church or in his parlor.

§ 2 is taken from the instruction of the Holy Office to the Bishop of Osnabrück, which says: If the pastor is asked by the parties concerning their intention of going to a preacher, or if he knows for certain that they will go to him, he is not allowed to remain silent, but must warn them of the grievous sin they are about to commit. However, to avoid greater evils, if the pastor is not asked whether they may go to a non-Catholic minister and no explicit declaration is made of their purpose, although he foresees their going thither and is aware that an admonition would do more harm than good, he may be silent, provided the scandal is repaired and the required promises are duly made.[41] Our text says that in both cases, *viz.:* when the parties intend to go or have already gone to the non-Catholic minister, the pastor must seek to remove the scandal and then consult the Ordinary as to what is to be done.

How the *scandal is to be removed* is not indicated in the said instruction. Evidently it must be done in such a way that the Catholic people are satisfied. Thus a public apology made before the congregation, or printed in a Catholic newspaper, or a public denunciation, if the parties went to the preacher after the Catholic wedding,

41 S. O., Feb. 17, 1864 (*Coll.*, n. 1247).

would repair the scandal. If they went to the minister before the Catholic wedding, the most efficacious way of removing the scandal would be a flat refusal of assistance until public penance is accepted.

DUTIES OF PASTORS

CAN. 1064

Ordinarii aliique animarum pastores:

1.° Fideles a mixtis nuptiis, quantum possunt, absterreant;

2.° Si eas impedire non valeant, omni studio curent ne contra Dei et Ecclesiae leges contrahantur;

3.° Mixtis nuptiis celebratis sive in proprio sive in alieno territorio, sedulo invigilent ut coniuges promissiones factas fideliter impleant;

4.° Assistentes matrimonio servent praescriptum can. 1102.

Ordinaries and other pastors of souls shall:

1.° Deter the faithful from contracting mixed marriages as much as they can;

2.° If they cannot prevent them, they shall take the greatest possible care that such marriages are celebrated according to the laws of God and the Church;

3.° After such a marriage has been contracted, either in their own territory or outside of it, they shall watch over the faithful fulfillment of the promises made;

4.° In assisting at such marriages they shall follow the regulations of can. 1102.

Reference may here be made to the IInd and IIIrd Plenary Councils of Baltimore. The former (n. 336) admonishes pastors to instruct the faithful at least once a year on the evils arising from mixed marriages. The latter (n. 133) advises frequent instruction, uniform prac-

tice in proceeding in such cases, an accurate examination of the reasons alleged to obtain a dispensation, and finally careful watching over the fulfilment of the promises. The Councils might profitably have added a little reminder to Ordinaries that they should examine the reasons alleged as to their canonical weight and accompanying circumstances. We know from experience that where local circumstances are such as to permit a dispensation on account of the small number of Catholics, God gives special graces, whereas those who contract a mixed marriage frivolously have to go without such help.

MARRIAGES WITH INDIFFERENTISTS DISCOURAGED

Can. 1065

§ 1. Absterreantur quoque fideles a matrimonio contrahendo cum iis qui notorie aut catholicam fidem abiecerunt, etsi ad sectam acatholicam non transierint, aut societatibus ab Ecclesia damnatis adscripti sunt.

§ 2. Parochus praedictis nuptiis ne assistat, nisi consulto Ordinario, qui inspectis omnibus rei adiunctis, ei permittere poterit ut matrimonio intersit, dummodo urgeat gravis causa et pro suo prudenti arbitrio Ordinarius iudicet satis cautum esse catholicae educationi universae prolis et remotioni periculi perversionis alterius coniugis.

Having laid down the rules for mixed marriages, the Code now turns to *marriages with unbelievers and Freemasons* and, in can. 1066, with public sinners and persons under ecclesiastical censure. The faithful, it says, should be deterred from marrying those who have notoriously renounced the Catholic faith, without, however, joining a non-Catholic sect, or with those who are notoriously affiliated with societies condemned by the Church. The

pastor shall not assist at such marriages, except after consulting the Ordinary, who, after due consideration of all the circumstances of the case, may permit the pastor to assist, provided there be a weighty reason and sufficient provision be made for the Catholic education of all the children.

The reason for this precaution lies in the danger of perversion of the Catholic party and of the offspring of the marriage. Hence it may be truly said that such unions are forbidden by the natural and by divine law, even though the Church does not prohibit them under penalty of an impediment. But since this class of persons are a real menace to the Church and to society, and at the same time only too ready to attack the faithful, it is impossible to treat them more leniently than is compatible with her fundamental principles. Every pastor should endeavor, by public and private exhortations, by prudent severity in the confessional, and by appealing to the parents of the Catholic party, to prevent such unions, from which no happy results can be expected. If his endeavors prove vain, he must report to the Ordinary.[42]

The latter must first and above all ascertain whether the apostasy of the party is *notorious, i. e.,* so well known that it cannot be concealed by any artifice.[43] If a man who no longer attends church is known to the whole community as an unbeliever who ridicules the Church, or if he has written publicly against the Catholic faith, he is a notorious apostate. The same rule must be applied to *Freemasons,* although in their case secrecy may cause some difficulty. But they have their meetings, balls, entertainments, badges and papers. Besides the identity of

42 S. O., Aug. 1, 1855; Aug. 21, 1861; Jan. 30, 1867; July 21, 1878 (*Coll.*, nn. 1116, 1219, 1300, 1495).

43 Can. 2197, 3; the addition "*nulloque iuris suffragio excusari possit,*" is implicitly verified in our case, for neither divine nor ecclesiastical law excuses an apostate.

their leaders and that of active, influential members can scarcely remain hidden, even if there were no lists of members. But it is not sufficient that they be merely notorious, they must also belong to a *condemned sect, i. e.,* a society which aims at the subversion of ecclesiastical or civil authority, no matter whether its members are bound by secrecy or not.[44] All such societies are strictly condemned. To this class belong, in our country, the lodges of the Oriental Rite. The "Independent Order of Good Templars,"[45] the "Odd Fellows," the "Sons of Temperance" and the "Knights of Pythias" are forbidden to Catholics but not explicitly declared to be under ecclesiastical censure,[46] and hence cannot be called condemned societies in the strict sense of the term.

When the Ordinary has informed himself as to the character of the non-Catholic party, he shall weigh the circumstances of the case, the influence of the apostate or Freemason, and of both parties and their families, and take into consideration the condition of the parish, the danger of probable scandal, and the consequences likely to follow. Before granting permission he must be morally certain that all the children will be baptized and brought up in the Catholic faith and that there is no danger that the Catholic party will be hindered in the practice of his or her religion. These *guarantees must* by all means *be obtained,* because they are demanded by divine law; but no writing or oath is required, a serious promise will suffice. Finally there must be *grave reasons* in order to permit assistance, and these may be either the canonical ones (can. 1054) or others that may claim the Ordinary's consent, for instance, danger of a purely civil

44 S. O., Aug. 5, 1846; S. C. P. F., Sept. 24, 1867 (*Coll.*, n. 1320); S. O., May 10, 1884 ad 3 (*Coll.*, n. 1615): "*contra Ecclesiam vel legitimam potestatem machinantur.*"

45 S. O., Aug. 9, 1893 (*Coll.*, n. 1845).

46 Putzer, *Comment.*, p. 235.

marriage and subsequent concubinage, danger to the Church at large or in the particular territory in question, probable hope of conversion, etc.

After all these precautions have been taken, the Ordinary may permit the pastor to be present at the marriage (*ut parochus matrimonio intersit*).[47] How far the assistance may go depends on the circumstances of the case. A directive norm is found in can. 1102, unless the Ordinary should deem it necessary to restrict the "assistance" to what is absolutely necessary.[48]

PUBLIC SIN AND CENSURE

CAN. 1066

Si publicus peccator aut censura notorie innodatus prius ad sacramentalem confessionem accedere aut cum Ecclesia reconciliari recusaverit, parochus eius matrimonio ne assistat, nisi gravis urgeat causa, de qua, si fieri possit, consulat Ordinarium.

This canon may be regarded as supplementing the previous one and concerns a case less detrimental to the public interest of the Church. It treats of *public sinners* and persons *notoriously under censure.* If such persons wish to get married, and refuse to go to confession or to be reconciled to the Church before the marriage, the pastor is not allowed to assist thereat, except for grave and urgent reasons, about which he shall, if possible, consult the Ordinary.

Public sinners, as distinguished from the others men-

47 S. O., July 5, 1878 (*Coll.*, n. 1495): "*permittere poterit, ut parochus matrimonio passive intersit, idest absque benedictione, alioque ritu ecclesiastico, tanquam testis authorizabilis.*" Of course, receiving and demanding the consent is strictly required, and it appears that assistance at such marriages is the same as at mixed marriages.

48 S. O., Feb. 1, 1883 (*Coll.*, n. 1591): "*omnino excludatur celebratio sacrificii Missae.*"

tioned, are persons who, through their own fault, are ignorant of the most necessary Christian doctrines, or refuse to comply with their duties as Catholics, especially that of receiving the sacraments and assisting at divine service, even though they may retain the faith.[49]

Notoriously under censure are those who have been excommunicated by name or denounced by the ecclesiastical judge, or whose censures are known to the people.[50] Stress is laid upon publicity, because if the pastor would know of a person's guilt or censure only from confession, he could not refuse his assistance, since this is a public act. But if the sinful conduct or censure is notorious, then what? The pastor should endeavor to bring such public sinners to their senses in the confessional, or by reconciliation, if censures have been incurred. In the latter case, therefore, absolution is required, and if the necessary faculties are wanting, recourse to the Ordinary is inevitable. If the parties both refuse, the pastor may, time permitting, report to the bishop. But if the case is urgent, and reasons are given, he may assist. St. Alphonsus is more rigoristic, yet he permits assistance if there be danger of death, or great evils affecting the community, or if the pastor foresees that the parties would continue to lead a sinful life.[51]

The text does not state what *kind of assistance* is to be granted, but as the quotations given by Card. Gasparri refer to the Freemasons, what has been said under the preceding canon, may also be applied here.

Since a marriage contracted against the prohibition of the Church is only illicit, not invalid, cases may arise

49 De Smet, *l. c.*, p. 139.

50 Can. 2197.

51 S. Poenit., Dec. 10, 1865 (*Coll.*, n. 1205, which refers to St. Alphonsus, l. VI, tr. 1, cap. 2, n. 54); Bened. XIV, *De Syn. Dioec.*, VIII, c. 14.

which require *straightening*. How is that to be done?

First be it noted that the case of a merely illicit marriage is comparatively rare. A marriage not contracted in the presence of the pastor (priest) and two witnesses is not merely illicit, but also invalid. If it is contracted properly, no unlawfulness attaches to it. However, it may happen, through ignorance on the part of the pastor, or by surprise, or in consequence of stubborn refusal of the two conditions or promises,[52] that a marriage is contracted in the prescribed form, yet without a dispensation, and therefore unlawfully. In that case the mode of procedure would be the following:

(1) If the parties were married in church, and *not before a non-Catholic minister as such* (*qua sacris addictus*), the pastor shall instruct them concerning the sin they have committed and the strict obligation of complying with the required conditions, especially that concerning the Catholic education of their offspring, and assure them that any contrary promises are not binding, because unjust. If they acknowledge the wrong they have done, and show signs of repentance, they may be admitted to the sacraments, with the imposition of a wholesome penance.[53] And this is all that may or should be done in such a case; for the marriage is valid, and the dispensation cannot affect its lawfulness after it has been contracted.

(2) If the parties have been married in church, but have *presented themselves before a non-Catholic minister, as such* (can. 1063), the Catholic party has incurred the *excommunicatio latae sententiae, reserved by law* (can. 2319, § 1, n. 1) *to the Ordinary*. This is the only cen-

52 The case is mentioned in a decree of the S. O., June 21, 1912 (*A. Ap. S.*, IV, 444), but not quoted by Card. Gasparri.

53 S. O., Jan. 3, 1871 (*Coll.*, n. 1362). But the two promises must be imposed.

sure, none other being mentioned in the Code. Hence what was formerly said about a reserved case [54] is now obsolete. But the way a pastor must proceed is not entirely changed. It is as follows:

(a) The pastor must seek to persuade the Catholic party to repent of his or her fault and deny him or her the sacraments until they do so.

(b) If there are signs of repentance, he must demand the two promises, as a rule in writing.

(c) If these promises are sincerely made, he shall apply the faculty of absolving from the episcopal censure, or procure the same if he does not yet enjoy it, and impose a wholesome penance. No renewal of consent is required.

If the *penance* is to be *public,* according to the diocesan statutes or a special injunction of the Ordinary,[55] in order to repair the scandal given, the pastor is not at liberty to remit it. Nothing else is to be done, because the marriage is supposed to be valid.

(3) If the marriage is *invalid* because of lack of the prescribed form — *vitio clandestinitatis* — the pastor must refuse the sacraments until the Catholic party repents and makes the two promises, and then obtain a dispensation. Should the parties have given their consent before a non-Catholic minister, the censure must also be removed. In that case the procedure would be as follows:

54 Putzer, *l. c.,* p. 65; Leitner, *l. c.,* p. 355 f., who would, of course, refer to "*Apostolicae Sedis,*" 1869, I, 3.

55 There is no doubt that the diocesan statutes or a special order of the bishop may lawfully impose public satisfaction. Besides, it must be noted that, if the censure is known publicly, the absolution should be imposed publicly. S. O., Feb. 17, 1864 (*Coll.,* n. 1247); S. O., Aug. 23, 1877 (*Coll.,* n. 1478). If the censure was occult, absolution *in foro interno* suffices. Furthermore, if the parties did not know of the censure, the latter is not incurred, provided theirs was not *ignorantia crassa* or *affectata.* Leitner, *l. c.,* p. 358.

(a) The *litterae reversales* or the two promises must be agreed to, either in writing or orally.

(b) Absolution from censure must be given.

(c) A dispensation from the impediment of mixed religion must be obtained and applied.

(d) The matrimonial consent must be renewed in the presence of the pastor and two witnesses.[56]

A new difficulty arises if the non-Catholic party refuses to renew the consent. In that case it would be necessary to revalidate the marriage *in radice*,[57] as explained in canons 1138–1141. But since our bishops enjoy the faculties mentioned under can. 1048, according to the decree of April 25 and Aug. 2, 1918, recourse to the Holy See is not required. In case of danger of death can. 1143 f. must be followed.

56 S. O., Aug. 23, 1877 (*Coll.*, n. 1478).

57 S. O., Nov. 22, 1889 (*Coll.*, n. 1721).

CHAPTER IV

DIRIMENT IMPEDIMENTS

This chapter enumerates twelve[1] *impediments which render* a marriage not only illicit, but also *invalid.* The Code does not determine which of these belong to the order of the natural and divine law, and which to the order of ecclesiastical law. If the reader, therefore, desires a classification, he will have to accept the statement of authors, who agree more or less on the subject. The only controversy of any importance concerns the impediment of consanguinity.

AGE

CAN. 1067

§ 1. Vir ante decimum sextum aetatis annum completum, mulier ante decimum quartum item completum, matrimonium validum inire non possunt.

§ 2. Licet matrimonium post praedictam aetatem contractum validum sit, curent tamen animarum pastores ab eo avertere iuvenes ante aetatem, qua, secundum regionis receptos mores, matrimonium iniri solet.

A boy can not validly contract marriage before he has completed his *sixteenth,* and a girl before she has completed her *fourteenth year.* Although marriage contracted after the aforesaid age is valid, pastors of souls

1 We say *twelve,* because legal adoption is an impediment only in countries where it has been set up as such by civil law, but does not affect the Church at large.

should deter from it young people who have not reached the age at which, according to the custom of the country, marriage is usually contracted.

In this formulation the impediment is of *merely ecclesiastical law,* which now demands a higher age than was formerly required. The Decretals [2] followed the Roman law in reckoning the age. There was a controversy between the Cassians and the Proculejans, until Justinian adopted the view of Proculejus, who maintained that the number of years, fourteen for boys and twelve for girls, should be decisive in admitting one to marriage. The Cassians, on the other hand, held that not only age but natural capacity for the marital act should be taken into consideration.[3] This double method of determining the impediment of age is noticeable not only in the early ecclesiastical legislation,[4] and in the *Summae* of Tancred [5] and Bernardus Papiensis,[6] but also in the Decretals quoted. In fact it remained in vogue until the present. For the commentators all distinguished between age properly so called, and mental and physical capacity. It was an axiom that "*malitia supplet aetatem.*" Most canonists assumed that, as far as mental ability was concerned, the impediment rested on the natural law, whilst impotence was not absolute, because it might disappear. In southern or warmer climates maturity is attained at an earlier age than in the North. Yet, if we may believe missionaries, no human being is ripe for marriage before the eleventh year of age. There are pontifical constitutions which forbid marriage to be contracted at the age

2 Cfr. cc. 12, 13, X, IV, 2; c. 2, X, IV, 15; c. un. 6°, IV, 2.

3 Cfr. ll. 13, 29, dig. 19, 1; pr. Inst. I, 22; l. 3, Cod. V, 60.

4 Cfr. Wasserschleben, *Die Bussordnungen,* pp. 178, 217, 583.

5 *Summa de Spons. et Mat.,* ed. Wunderlich, p. 22.

6 *Summa de Mat.,* ed. Laspeyres: "*Impossibilitas coeundi animo et corpore tam impedit matrimonium quam dirimit contractum.*"

of six or seven, but they do not state a precise limit.[7]

Our Code lays down the age-limit without reference to either mental or bodily capacity. However, it stands to reason that if a real and substantial defect of mind could be proved, a marriage would be invalid even after the age designated in the Code. But in that case the subject belongs to the next chapter, which treats of consent. As to impotency, this must be judged according to the following canon.

In the United States there is no uniformity in the civil law of the different States with regard to the age limit for marriage. While in some the common-law age of consent, namely fourteen and twelve, prevails, in others it has been raised by statutes. The terms differ.[8] The Statute of Missouri (sect. 4321) reads in part: "No recorder shall issue a license authorizing the marriage of any male person under the age of twenty-one years, or female under eighteen, except with the consent of his or her father or mother." But the invalidity of a marriage under that age is nowhere explicitly asserted. The Church, however, wisely admonishes pastors to deter young people from marrying against the statutes of their respective country. For the custom of a country is the best interpreter of the natural law in matters of this kind.

IMPOTENCY

Can. 1068

§ 1. Impotentia antecedens et perpetua, sive ex parte viri sive ex parte mulieris, sive alteri cognita sive non,

7 Bened. XIV, "*Omnium sollicitudinum*," Sept. 12, 1744, and the Const. of Clement XII, quoted in the same Bull. (ed. Prati, Vol. I, 428 ff.).

8 Bishop, *Marriage Laws*, I, p. 249, § 582.

sive absoluta sive relativa, matrimonium ipso naturae iure dirimit.

§ 2. Si impedimentum impotentiae dubium sit, sive dubio iuris sive dubio facti, matrimonium non est impediendum.

§ 3. Sterilitas matrimonium nec dirimit nec impedit.

§ 1. Anterior and perpetual *impotency,* whether in man or woman, whether known to the other party or not, whether absolute or relative, renders marriage invalid by the very law of nature.

§ 2. If the impediment of impotency is *doubtful,* whether the doubt be one of fact or by reason of the law being doubtful, marriage should not be hindered.

§ 3. *Sterility* renders marriage neither invalid nor illicit.

This is the impediment of impotency, set up by *natural law.* As its nature is not determined in the text, there is room for controversy, which has not been wanting. The reader may rest assured that we shall not carry coal to Newcastle, but keep within the boundaries of Canon Law.

(1) What is *impotency?* In order to understand the attitude of the Church on this subject, a brief historical note seems necessary. The *Roman law* distinguished two classes of eunuchs or *spadones;* [9] those who could not beget children and yet were entitled to contract marriage with all its juridical effects; and those who could neither beget children nor contract marriage according to law. In case of natural incapacity for marital intercourse (*impotentia coeundi*) the law permitted dissolution of the union after an experiment of two or three years.[10]

The *ecclesiastical* conformed to the Roman law up

9 *Spado* from the Greek σπάω, *to draw, pull, pluck,* hence, *to castrate.*

10 Cfr. § 9, *Inst.,* I, 11; fr. 39, dig. 23, 3; l. 10, Cod. V, 17; Nov. 22, c. 6; Nov. 117, c. 12.

to the eighth century.[11] A fluctuation is noticeable in the writings of Bernardus Papiensis and Tancred, who, however, following the French school, maintained the invalidity of a marriage contracted with natural impotency.[12] According to the belief of those ages there was an artificial impotency, due to satanic influence or witchcraft.[13] This artificial, as distinguished from natural impotency, or *frigiditas,* was not commonly regarded as sufficient to constitute a diriment impediment. Some uncertainty is perceptible in the Decretals, where the expedient of allowing the parties to cohabit as brother and sister is resorted to. Nor is the distinction between absolute and relative impotency uniformly maintained. All this goes to prove the wavering attitude of the School in this matter. But the triennial experiment is fully admitted,[14] and it is further evident from the Decretals that *impotentia coeundi* is the distinctive characteristic of the impediment; hence the terms: *foeminae clausae, impotentes commisceri maribus, arctae,* whilst the men are called *frigidi,* or simply *impotentes coeundi, debitum reddere non potentes.* At the same time, however, note the terms: *volo esse mater, nunquam potuit fieri mater aut conjux, tanquam cui naturale deerat instrumentum.* We note this purposely, in order to enable the reader to pass a fair judgment on the opinions of those times. What the theologians taught will be stated later.

The answer to the question, what is impotency? may be given thus: It is a natural incapacity both for marital intercourse and the procreation of offspring.[15] This

11 Cfr. Wasserschleben, *l. c.,* p. 216; c. 18, C. 32, q. 7, which latter text is a decision of Greg. II, but seems rather a dissolution of a ratified marriage.

12 *Summa cit.,* p. 177 f.; Tancred, *Summa cit.,* p. 63.

13 Cfr. X, IV, 15, *de frigidis et maleficiatis et impotentia coeundi.*

14 C. 5, X, IV, 15.

15 Cfr. *New International Encyc.* 1904, *s. v.* "Impotency."

definition would be given by any physiologist. But theologians and canonists adopt a more restricted definition of impotency. They say: *It is incapacity for performing the marital act, which in itself would be apt for procreation.*[16]

Incapacity in this sense exists where the necessary organs are entirely lacking. Men who have been completely castrated are incapable of exercising the *copula.*[17] In women complete or perfect *vaginismus* (*arctitudo*) causes incapacity for copulation. If this condition is incurable, the defect is called *perpetual,* and if it existed before marriage, it is called *antecedent,* in order to distinguish it from impotency contracted after marriage. Note well: we say *contracted,* not *discovered.* For it may happen that a person had the defect before marriage but was unaware of its existence, although it is difficult to understand that no physical disturbance should follow such a defect. But whether it becomes known after marriage only or is realized before marriage, whether or not the party suffering from it revealed the defect to the other party, is immaterial. If it existed in an incurable and therefore perpetual form, it affects the validity of the marriage.

A distinction may be drawn between absolute and relative impotency. This is illustrated by the following case: Gemma upon ocular inspection was declared to lack the natural instrument of copulation, and was therefore granted a separation from James. But she found another man with whom she could have marital intercourse.[18]

16 "*Inhabilitas ad copulam, quae ex se* (or *per se*) *apta est ad generationem.*"

17 Sixtus V, "*Cum frequenter,*" June 27, 1587: "*Spadones utroque teste carentes*" are declared incapable of contracting marriage.

18 C. 5, X, IV, 15: "*Mulier invenit qui seras huiusmodi reseravit,*" which seems to allude to an anatomical rather than physiological defect.

This is *relative* impotency, which affects a marriage between two definite persons only. But suppose Gemma had been entirely devoid of natural organs, or so affected with complete *vaginismus,* that intercourse would have been impossible to her with any man; then there would have been *absolute* impotency. Similarly a complete eunuch could not contract marriage with any woman.

(2) The second part of our definition also calls for some explanation. "*Per se apta ad generationem*" means intercourse which is *per se* conducive to procreation. Here is the salient point of the controversy which was called forth by two decisions of the Holy Office, Feb. 3, 1887, and July 30, 1890.[19] These decisions read as follows:

That of 1887: "*Num mulier, per utriusque ovarii excisi defectum sterilis effecta, ad matrimonium ineundum permitti valeat et liceat, necne? Resp. Re mature diuque perpensa, matrimonium mulieris, de qua in casu, non esse impediendum.*"

That of 1890 (Quebec.): "*Se una donna, cui per mano chirurgica siano asportate ambedue le ovarie e l'utero, possa validamente contrarre matrimonio.*" *Resp. Matrimonium non esse impediendum.*" (Cfr. *Coll. P. F.,* n. 1733.)

It follows that the lack of ovaries and uterus in a woman does not constitute the invalidating impediment of impotency. A distinction is here clearly supposed between the *terminus a quo* and the *terminus ad quem* of the copula. The former is the conjugal act, taken as fecund, at least *in posse,* provided no obstacle interferes.

19 Cfr. *Am. Eccl. Rev.,* Vol. XXVIII, pp. 51 ff., where the pros and cons are discussed at some length; cfr. O'Malley and Walsh, *Essays in Pastoral Medicine,* 1911, p. 326 ff., whose medical judgment gives way to moralist assumptions.

The *terminus ad quem* is the same act as related to the organs and elements required for fecundation, and therefore presupposes these organs, especially the ovaries and the uterus, to be in a condition fit to produce the natural result of the act, namely, procreation. The decisions quoted simply require the *terminus a quo*.

(3) What of impotency if it negatively at least frustrates the primary end of marriage? In other words, *can the Church declare that a marriage is valid, although the primary end of marriage cannot be obtained?* After having read all the authors on the subject, the conclusion was forced upon us in the shape of the question just formulated. It is a theological rather than a physiological problem. In order not to fatigue the reader, as we were fatigued by reading all those hundreds of pages,[20] we briefly resume the matter as follows:

(a) *Ab esse ad posse valet illatio.* The decisions of the Holy Office quoted reflect the power of the Church, but only over single or individual cases, as those mentioned really were. We may not generalize them, especially since the Holy Office never states the reasons for its decisions. But the decisions of that august Congregation are neither infallible, nor do they extend beyond the cases for which they are rendered, unless the wording has a general tenor.

(b) What justifies these decisions *in casu* is the fact that marriage has several ends or purposes for which it was instituted by the Author of nature. The *primary end* is the *procreation of offspring,* and this is not only intrinsic but also essential to marriage.[21] It is the *officium naturae.* When we assert that it is essential, we do not,

20 Cf. Eschbach, *Disputationes Physiologico-Theologicae,* 1901; Id. in *Anal. Eccl.,* t. X, pp. 85 ff.; Antonelli, *Medicina Pastoralis,* 1905; Id., *De Conceptu Impotentiae et Sterilitatis,* 1901.

21 It is difficult to admit statements made by the Salmant. and St.

however, mean to say that it is the sole end of marriage, because there are secondary ends, as stated in can. 1013: mutual help and relief of concupiscence. The right of declaring that, in a particular case, the secondary ends suffice, provided everything is done in a lawful manner, in order to contract a valid marriage, must be vindicated to the supreme authority in a matter subject to its power. For the welfare, not only of single individuals, but of Christian society at large, demands that there be such a power, and none other can be imagined than the one set up by God for ruling the society instituted by Christ. This is nothing else but an interpretation of the natural law.

(c) We do not believe that any further reason can be assigned to justify the aforesaid decisions. We are aware indeed of the argument that want of ovaries and uterus is similar to lack of the power of begetting children in an old woman, or, in other words, to sterility. However, the comparison is not perfect. For, in the first place, sterility is only partial and sometimes only temporary impotency, which may be removed either by natural or preternatural means.[22] No doubt the possibility of a miraculous interference had much to do with the attitude of the Church towards sterility.[23] Besides, as the late Fr.

Alphonsus (cfr. *Anal. Eccl.* 1902, t. X, p. 468; *Amer. Eccl. Rev.*, Vol. XXVIII, p. 658) that the *susceptio prolis est (nec unicus) nec immediatus finis matrimonii.* What then is the *finis primarius?* The *coitus?* The sophism (*Am. Eccl. Rev.*, 28, 651) does not consist in distinguishing the ecclesiastical from the medical sense of impotency, but in admitting a difference between natural and ecclesiastical impotency. The impotency caused by nature and intended by the Church must be one and the same. See *Am. Eccl. Rev.*, April 1919, Vol. 60, 426 ff., where the doctrine of St. Thomas concerning consummation of marriage is clearly set forth.

22 We would like to hear an able physician's view as to whether a woman destitute of ovaries and uterus could by miraculous interference be made pregnant and bring forth a child.

23 Examples: Sarah, Anna, Elizabeth, the parents of SS. Nicholas

Lehmkuhl, S. J., justly pointed out, there is a great dissimilarity between the two cases.[24] If the ovaries and the uterus are excised, we have a positive interference, either lawful or unlawful, with nature. If this interference takes place by mutual consent and agreement, it invalidates marriage because it is incompatible with a substantial end of marriage. Sterility, on the other hand, is merely a passive condition of either one or both parties, which does not in any shape or form suppose a mutual pact of avoiding the primary end of marriage. If marriages such as those referred to in the two decisions would be allowed generally, and not merely by way of exception, one stronghold against race suicide would be seriously shaken, and the primary end of marriage would be made coordinate with the other two, which are merely secondary.

§ 2 permits marriage as *licit and valid* if there is any doubt as to the existence of the impediment of impotency. The existing doubt may be one of *fact* or of *law*. There is a *dubium facti* if the natural impotency is not absolutely proven, for instance, in surgical operations, after which there sometimes remain traces of the generative power. A doubt of *law* existed in the case mentioned above, because it seems as yet uncertain how far the limits of impotency extend. Until a general interpretation is given [25] the Church wishes us to apply the principle: "*In dubio libertati favendum est.*"

For the rest, the Holy Office has declared that in case of doubt recourse should be had to Rome.[26]

of Tolentino and Juliana de' Falconieri.

24 *Am. Eccl. Rev.*, Vol. 28, 317.

25 That the decision of S. O., July 23, 1890 (*Coll. P. F.* n. 1733) was only a *particular* one, is duly noted by the editors of the *Collectanea P. F.* (see the number quoted). This corroborates our view. The other *causa* referred to by Card. Gasparri is rather a dispensation from a ratified marriage; cfr. *A. S. S.*, t. 14, p. 68.

26 S. O., July 31, 1895; Jan. 16,

§ 3 mentions *sterility*. Now sterility exists when the *copula per se apta ad generationem* can be properly performed, but by a merely accidental and natural fact fecundation does not follow. This happens when marriage is contracted at an advanced age when the generative powers have ceased to function. Those authors who maintain that a woman without ovaries and uterus can contract a valid marriage, would consistently have to reduce that kind of impotency to mere sterility. What we said on the subject under § 1, (3, c.) may suffice. We will only add that if no sophistry is to be practiced, the ecclesiastical concept of the impediment of impotency cannot differ from that given by competent physiologists, since the impediment of impotency is not established by the Church, but by the law of nature.

We add a few practical hints to the *confessor* or *pastor*. The first question, of course, in such a case would be, whether a conscientious physician has been consulted and what was his opinion? If the physician diagnosed the case as one of perpetual and antecedent impotency, his judgment must be referred to the diocesan court, unless there is room for the solid presumption that the parties may be allowed to live together like brother and sister, and a separation would cause grave scandal. But the danger of incontinency must be remote.[27] If the parties prefer to get an ecclesiastical divorce, that would dissolve the matrimonial tie.

A triennial experiment is no longer admitted, but its place is taken by ocular inspection by physicians or nurses.

As to *hermaphrodites*, or such persons as have the sexual characteristics of both sexes, whether it be *andro-*

1895 (*Coll.*, n. 1907, Vol. II, 324).

27 S. O., March 8, 1900 (*Coll.*, n. 2078); Leitner, *l. c.*, p. 151 f.

gynia or *gynandria* or *hermaphroditismus neuter,* the testimony of physicians is required. No *hermaphroditus neuter* can possibly be called capable of marrying because the sex is not sufficiently determined.[28] Finally it must be observed that *artificial fecundation, i. e., extra copulam naturalem,* is never allowed.[29]

The *parties* involved *are alone competent* to *attack the marriage* on the score of impotency, for they are the only ones interested. And if they do so, they must prove that the existing impotency is antecedent and perpetual and cannot be removed by natural and lawful means. If it is absolute, *i. e.,* renders the conjugal act impossible, it also renders marriage with every other person invalid; if it is merely relative, it affects only the persons concerned.[30]

LIGAMEN OR BOND OF A PREVIOUS MARRIAGE

CAN. 1069

§ 1. Invalide matrimonium attentat qui vinculo tenetur prioris matrimonii, quanquam non consummati, salvo privilegio fidei.

§ 2. Quamvis prius matrimonium sit irritum aut solutum qualibet ex causa, non ideo licet aliud contrahere, antequam de prioris nullitate aut solutione legitime et certo constiterit.

§ 1. Those bound by the bonds of a former marriage, even though it was not consummated, attempt marriage invalidly, excepting the privilege of the faith.

§ 2. Although the previous marriage be invalid or dissolved for whatever reason, it is not lawful to contract

28 Antonelli, *l. c.,* p. 105 f.; Eschbach, *l. c.,* p. 53 f.

29 S. O., March 24, 1897 (*Coll.,* n. 1904): "*Ssmus adprobavit,*" the clause added to that decision, is not found in the other two.

30 *Instructio S. C. P. F.,* 1883, n. 46 (*Coll.,* n. 1587)

another one before the nullity or dissolution of the first has been legally and certainly established.

The essential properties of marriage, unity and indissolubility, excluae a valid marriage with another party while the marital bond continues. Divorce, as understood by the civil law, was and is repudiated by the Church. A person who married a divorced man or woman in former times had to do penance publicly and break off the unlawful relation, otherwise he was denied the Sacraments, except at the point of death.[31] However, it cannot be denied that a *matrimonium ratum tantum* was judged more liable to solution than one both ratified and consummated, and diverse opinions, even of Roman Pontiffs, floated about in the canonical air [32] until a decision given by Pope Alexander III made the position of the Church more uniform. From the Penitential Books we know that the time of waiting for the certainty of death of the other party was not extended, five years being deemed sufficient if the party was taken captive,[33] nor rigorously insisted upon. This leniency is easily explained by the slow and difficult means of communication in times past.

§ 1 sets up the *diriment impediment* of the *marriage bond,* or *ligamen,* opposed alike to polygamy and divorce. That this impediment exist, it is required, (a) that the first marriage was valid and never dissolved, even though (b) the union is not yet consummated, but only ratified. This latter condition is quite intelligible, because the marriage bond is validly contracted by a valid consent, and needs no consummation to be perfect.

31 Syn. of Elvira (305), can. 9; c. 8, C. 32, q. 7.

32 Cfr. Bernard. Pap., *l. c.,* p. 298; Rolandus Mag., *Summa,* ed. Thaner, pp. 114, 187, 200; Tancred, *l. c.,* p. 49; c. 3, X, IV, 14, where Alex. III reviews different verdicts of his predecessors.

33 Cfr. Wasserschleben, *l. c.,* p. 148.

The first condition supposes a valid *union* that has not been legitimately dissolved. Validity depends on the valid consent, on the observance of the prescribed form, and on the absence of diriment impediments. The *consent* would be affected by a condition opposed to the essential qualities of unity and indissolubility. For instance, a couple taught to contract marriage subject to divorce would contract invalidly, if this condition was stipulated by mutual consent.[34] The *form* would affect the validity if marriage were contracted against can. 1094 ff. A *diriment impediment* would invalidate the marriage if it objectively affected either one or both of the parties. Thus, for instance, James, a baptized person, pretending to be a Catholic, married Gemma, but afterwards declared that he was no Catholic at all. The marriage was declared valid on the ground that, as James was baptized, neither dissimulation nor apostasy could annul a marriage validly and lawfully contracted by him.[35] The privilege of the faith could not be invoked in this case.[36] As long as a former marriage exists, the second is invalid, and the parties must separate.[37] The clergy or hierarchy cannot connive at polygamy, even though there were danger that a whole country would be involved in heresy, as happened once upon a time in Transylvania (Hungary). All they can do is to abstain from inflicting penalties, if the danger of apostasy is general.[38]

A marriage which is only *ratified,* not *consummated,* may be solved by papal intervention, as shall be seen un-

34 S. O., Jan. 24, 1877 (*Coll. P. F.*, n. 1465); cfr. can. 1092.

35 S. O., March 20, 1817 (*Coll.*, n. 721).

36 S. O., March 20, 1675 (*Coll.*, n. 208). A Christian became a Mohammedan after baptism and marriage; the bond remains; cfr. S. O., Dec. 11, 1850, ad 25–27 (*Coll.*, n. 1054).

37 S. O., Aug. 19, 1857 (*Coll.*, n. 1147).

38 S. O., June 23, 1671, ad 3 (*Coll.*, n. 196).

der can. 1119, and by religious profession, which is treated under can. 1073.

A legitimate though consummated marriage can be dissolved only by the application of the Pauline Privilege (see can. 1120 ff.).

§ 2 treats of what is technically called *certus mortis nuntius,* certainty regarding the death of the other party. The *proof* for the dissolution of the former marriage bond, says the text, must be *legal* and *certain.* If legal proof has been duly furnished, the ecclesiastical judge need require no more. Before explaining the method of procedure in such matters, some preliminary remarks seem pertinent.

(a) There is no definite time limit or determined number of years required for quasi-prescription; hence the ecclesiastical judge should never conform himself to the prescription of the civil law concerning the number of years.[39]

(b) The clergy can never declare that, if no notice of death is received, a marriage is dissolved after a certain lapse of time. To do so would be coöperating in polygamy and adultery.[40] Note here what has been said under can. 1031.

The *method of legally proving the death* of a person is as follows:[41]

1. If possible, an *authentic document*[42] must be obtained from the records of the parish or hospital or asylum or military department, or from civil authority.

2. If no such document can be obtained, *two witnesses*

39 S. O., Instr. 1868 (*Coll.,* n. 1321). Our modern codes admit full divorce in case of prolonged absence; cfr., for instance, the Statutes of Missouri, sect. 2921, where one year's absence is declared sufficient.

40 S. O., June 23, 1671 ad 1 (*Coll.,* n. 196).

41 *Instructio S. O.,* 1868 (*Coll.,* n. 1321); *Instr. S. C. P. F.,* 1883 (*Coll.,* n. 1587).

42 What an authentic document is may be seen under can. 1990.

may be admitted. These must be trustworthy persons and testify under oath. They must have known the person whose death they attest, and their testimony must agree as to the place, the cause and the essential circumstances of the death.

3. If two witnesses cannot be produced, *one will suffice,* provided he was acquainted with the party and the circumstances of death, and nothing unsuitable or unlikely is found in his deposition.

These witnesses may also testify from *hearsay,* provided their testimony agrees with circumstances known from other sources, and provided their information has come from direct witnesses.

4. If no witnesses are available, the judge may resort to *circumstantial evidence,* which is furnished by conjectures, presumptions, and circumstances that preceded, accompanied, and followed the supposed death. Examples are furnished by military companions, especially officers, or by the companions and circumstances of a voyage either on land or sea; whether the person in question travelled alone or in company, for what purpose, which was his route and destiny, whether a wreck took place, etc.

5. *Rumor* may be admitted if other proofs are wanting. A rumor must be established by two trustworthy witnesses who testify under oath to its reasonableness as also to the general opinion of the people and their own conviction.

6. Finally, a *newspaper advertisement* may effect the desired result, especially if the manager is furnished with the necessary information.

These are the rules which the ecclesiastical judge should follow. If he is morally certain of the death of the other party, he may pronounce sentence to the effect

that the surviving party may contract another marriage. Nor are two uniform sentences required to permit a second marriage.[43] If the doubt can not be entirely removed, recourse must be had to Rome and all the documents forwarded thither.[44] Meanwhile the parties must be told to separate until a decision is rendered.

Here it may be stated that neither the *confessor* nor the *pastor* are entitled to give judgment in such cases. When approached, they must direct the parties to the diocesan court, or, with the permission of the latter, themselves bring the case before that tribunal. If a second marriage was already concluded and a reasonable doubt as to the death of the former party exists, the parties must be told to suspend their marital relations (*copula*) until a decision is given.[45]

The Code says that until such a verdict is rendered, the parties concerned may not *lawfully* contract a new marriage. This means that the second marriage will be valid, provided the former marriage was dissolved by whatever cause. This case was brought before the S. C. C., which decided that the second marriage was valid, though illicit.[46] Consequently the party thus contracting a marriage without full certainty as to the former partner's death, though it had really occurred, would not be allowed to demand the *debitum,* but only to render it if asked.

A curious case was solved in 1865 by the Holy Office.[47] Titius was taken by rebels and no notice of his fate reached his wife Martha for two or three years. She married a man named Mark, a Christian like herself. Mark, being seriously rebuked by the local missionary, declared his

43 S. O., May 6, 1891 (*A. S. S.*, t. 24, 747).

44 S. O., Aug. 19, 1857 ad 2 (*Coll.*, n. 1147).

45 Cfr. Leitner, *l. c.*, p. 170 f.

46 S. C. C., Sept. 9, 1752, Smyr. (Richter, *Trid.*, p. 225, n. 92).

47 S. O., March 22, 1865 (*Coll.*, n. 1272).

readiness to leave Martha, but wished to marry another woman. The Holy Office decided that the parties were to be separated, but Mark could not marry another until he was morally certain that at the time of his marriage to Martha, the latter's husband was still alive. Although this solution at first blush seems strange, it is quite logical, for if Martha's first husband had been dead when she married Mark, the marriage would have been valid and Mark could not validly leave her and marry another. Therefore he had to wait until he could obtain certainty regarding Titius's death.

DISPARITY OF WORSHIP

CAN. 1070

§ 1. Nullum est matrimonium contractum a persona non baptizata cum persona baptizata in Ecclesia catholica vel ad eandem ex haeresi aut schismate conversa.

§ 2. Si pars tempore contracti matrimonii tanquam baptizata communiter habebatur aut eius baptismus erat dubius, standum est, ad normam can. 1014, pro valore matrimonii, donec certo probetur alteram partem baptizatam esse, alteram vero non baptizatam.

§ 1. A marriage is null when contracted by a non-baptized person with a person baptized in, or converted to, the Catholic Church from heresy or schism.

§ 2. If the party, at the time of the marriage contract, was commonly held to have been baptized, or if his or her baptism was doubtful, the marriage must be regarded as valid in accordance with can. 1014, until it is proved with certainty that one party was baptized and the other was not.

Can. 1071

Quae de mixtis nuptiis in canonibus 1060–1064 praescripta sunt, applicari quoque debent matrimoniis quibus obstat impedimentum disparitatis cultus.

The rules laid down in can. 1060–1064 for mixed marriages must be applied also to marriages to which there is an impediment of disparity of worship.

This impediment, like that of mixed religion, is based on the natural and on divine law. The natural law, as stated above, forbids endangering one's faith without necessity. The divine law has a positive foundation in Holy Writ, which reprobates unions between Jews and Gentiles.[48] Christianity in the beginning was more lenient in this respect, for reasons which were certainly justified.[49] The Christian Emperors declared marriages between Jews and Christians illegitimate.[50] This civil legislation was adopted by a number of councils (Elvira, 305, Toledo VI and X, Orleans and Clermont).[51] In the eleventh and twelfth centuries canonists regarded heresy as a diriment impediment. Gradually, however, since the beginning of the thirteenth century, by custom rather than by positive law, a distinction was made between infidelity and heresy with regard to marriage.[52]

1. The *foundation* of this impediment is the essential difference of religion brought about by *Baptism.* Hence a pagan, whether Buddhist, Brahman, Mussulman, or a Jew, even though enrolled among the catechumens,

48 Exod. 34, 16; Deut. 7, 3 f.

49 Cfr. Tertull., *De Corona,* c. 13; *De Monogamia,* c. 11; *Ad Uxorem,* II, 3. He rebukes marriages with pagans, but never says they are invalid.

50 L. 2, Cod. Theod., III, 7; l. 2, *ib.* XVI, 8; l. 6, Cod. I, 9.

51 Cfr. Freisen, *l. c.,* p. 635 f.

52 Bened. XIV, *"Singulari Nobis,"* Feb. 9, 1747, § 9.

cannot validly contract a marriage with a baptized Catholic.

2. Note the difference between marriages contracted before May 19, 1918, and after that date. The Code, while it legislates only for Catholics, appears to imply that after the date mentioned Catholics only are bound by this impediment. Such, at least, seems to be the prevalent opinion.[53] But the question arises, What about the impediment if contracted before May 19, 1918? Take an example. James, a Jew, married Gemma, a baptized Anglican, in 1913. Was the marriage valid? No, because before the promulgation of the Code the impediment of disparity of worship bound baptized Protestants. Has the marriage become valid since the promulgation of the Code? No, because marriages contracted invalidly by reason of ecclesiastical impediments abrogated by the New Code do not become valid by its promulgation. Hence if either James or Gemma should become a Catholic, they would need a dispensation or, possibly, a *sanatio in radice*. This is the answer given by the Commission for the Authentic Interpretation of the Code.[54] There is only one difficulty connected with this answer: The number (1) which contains the answer speaks exclusively of promulgation, whilst the following number, which treats of spiritual relationship, takes May 19, 1918, as the date on which the impediment, as formerly understood, ceased. However, since the same Commission speaks in n. 6 of the *ius vigens* (the law as now in force), we believe that promulgation in our case, which has no date, must be taken as May 19, 1918, or the date on which the Code commenced to be law.

53 Cfr. *Am. Eccl. Rev.*, 1918, Vol. LVIII, p. 484. The quotations in Card. Gasparri's edition seem to prove the contrary.

54 June 2–3, 1918 (*A. Ap. S.*, X, 346).

3. The *Catholic* who cannot validly marry a non-baptized person is one who was either baptized in the Catholic Church, or converted thereto from heresy or schism.

(a) He is *baptized in the Catholic Church* who has become a member of that body through valid Baptism. If a Catholic minister performed the ceremony, there can be no reasonable doubt as to its validity. But since private baptism may also be employed, and parents have the right of baptizing their children at least when there is danger of death,[55] Baptism must also in this case be presumed as given in the Catholic Church. The same must be said if Catholic grandparents, or guardians, have baptized a child in a case permitted by law.[56]

(b) *Converts* are persons who have been heretics or schismatics, but embraced the Catholic faith either by receiving (conditional) Baptism or by abjuring their former creed. *Heretics* are those who, after having received Baptism, retain the name of Christian, but pertinaciously deny or doubt some truth which must be believed by divine or Catholic faith. A *schismatic* is one who refuses to subject himself to the Sovereign Pontiff or to be in union with the members of the Church subject to him.[57] A heretical tendency is usually connected with schism. Heretics, then, and schismatics, if converted to the Catholic faith, cannot validly contract marriage with a non-baptized person. The question here arises: does can. 1099, § 1, n. 2, apply to the following case? James had been a convert to the Catholic faith for a number of years. Now he is engaged to a rich young lady, Gemma, who, though taken to be a Protestant, was never baptized. She is opposed to a Catholic marriage

55 Cfr. can. 742, § 3.
56 Cfr. can. 750, § 2, and what is said under can. 1099, § 1.
57 Cfr. can. 1325, § 2.

and mode of life, and spurns any insinuation as to promises. James finally gives way and leaves the Catholic faith, declaring himself a Protestant. After a few months the two are married before a squire. No doubt can. 1099, § 1, n. 2, renders that marriage invalid; for the form prescribed was not observed. But does can. 1070, § 1, also render it invalid? It might justly be urged that this canon supposes the party, actually there and then, at the moment of the marriage, to belong to the Catholic religion. Yet the rule of interpretation from parallel texts would seem to demand that the law of clandestinity be here applied to the case of disparity of cult. For the wording is almost the same. Therefore we believe that the marriage *in casu* is invalid on account of the existing impediment of disparity of cult as well as by reason of lack of the required form.[58]

§ 2 speaks of a *common opinion* to the effect that a person was baptized. Here is a case in point. Gemma was held by all to be a Catholic and married James, a Catholic, in church. But afterwards she told the priest that she had never been baptized. The priest baptized her secretly and probably thought this revalidated the marriage; but it did not, because the impediment was objectively and subjectively in the way of validity. Therefore, simple revalidation being impossible, there was no other remedy left but *sanatio in radice*.[59] Ignorance of the law enacting the impediment does not excuse. For impediments are not established for private but for the public good.[60] In the case just mentioned the proof that

58 Can. 1099, § 1, n. 1, causes some difficulty, because even a fallen-away convert is bound to observe the form prescribed by the Church.

59 S. O., Aug. 22, 1906 (*Anal. Eccl.*, 1907, t. XV, p. 8 f.); April 29, 1842 (*Coll.*, n. 948).

60 S. O., Sept. 19, 1671 (*Coll.*, n. 202) says: "*Et lex huiusmodi impedimentum inducens non fuit invincibiliter ignorata*"; but this

Gemma never was baptized was given in the confessional, and this was deemed sufficient.

More difficult would be the case where *Baptism was doubtful.* Most sects now-a-days care little for this sacrament; not a few openly spurn it. The rules given above for mixed marriages suffice to enable us to understand the Roman practice. For the rest, conditional Baptism may remove the difficulties. But the general rule stated above (under mixed marriages) that each Baptism must be examined separately, especially as to matter, form, and the intention of the minister, also holds good in the case of this diriment impediment.[61] See the answer given by the Holy Office to the bishop of Seattle (then Nesqually), that a general presumption against the validity of Baptism is not admissible. The bishop had asked concerning the baptism conferred by Methodist preachers, who were (and are) inclined to deny the necessity and efficacy of this sacrament and employ a doubtful form, especially in regard to the Holy Ghost. The Holy Office[62] answered that an erroneous intention on the part of the minister concerning the efficacy of Baptism does not affect its validity, and as to the mode of administering the sacrament, the ritual used by these ministers should be examined to ascertain whether the rite contains anything affecting the validity of Baptism. Inquiry should also be made into the conduct of the minister,— whether he observed the ritual of his denomination, etc. From all this it will be seen that no general rule can be established with regard to the validity of

clause refers to admission to the sacraments; elsewhere the Holy Office declared that ignorance, even if invincible, does not remove the impediment; S. O., July 4, 1855; March 11, 1868 (*Coll.*, nn. 1114, 1326).

61 S. O., Nov. 17, 1830; July 5, 1853; Jan. 24, 1877 (*Coll.*, nn. 821, 1096, 1465).

62 S. O., Jan. 24, 1877 (*Coll.*, n. 1465).

Baptism administered by American Methodists. That Anglicans baptize validly is taken for granted in the same document, whereas the Baptism of Quakers is rejected as invalid.

But in all cases certain proof, and not a mere presumption, is required to establish the validity or invalidity of a Baptism. Where no proof is adduced, the *presumption is in favor of validity*. The question how proof is to be furnished may cause trouble and a good deal of writing. If no baptismal record can be obtained, and no witnesses (sponsors) or parents are available to testify to the fact of Baptism, the party himself must be asked under oath whether he knows anything of Baptism being administered to him, what sect he or his parents belonged to, etc. Then the rules given above for mixed marriages may be applied. Until this is done, however, the party must be presumed to have been validly baptized, unless he and his parents were unbelievers, in which case there would be a strong presumption that Baptism had never been administered.[63] (See Appendix III, *infra*.)

Can. 1071 mentions the *promises and reasons* stated under the same heading in can. 1060–1064 concerning mixed marriages. The two promises must be made in the same way as in mixed marriages, and the reasons must be just as strong as, if not stronger than, those required for a mixed marriage. The Roman Court has always insisted upon very grave reasons.[64] However, the canonical reasons mentioned under can. 1054 will suffice. Yet if there were great danger of scandal, especially in an entirely Christian country, the Holy See might not dispense.[65]

63 Yet even in that case the possibility of Baptism is not entirely excluded, for it may be that the child was baptized in a hospital or by a nurse, etc.

64 S. O., Sept. 5, 1736 (*Coll.*, n. 319). A long-standing marriage and offspring would be a solid reason.

65 The case of Popper-Castrone

As to the *faculties of our Ordinaries,* see under can. 1048. A few remarks may complete what is said there. There is a decision of the Holy Office which says that a dispensation granted without demanding the guarantees, or after the contracting parties have refused to give them, is null. The Ordinary may, without recurring to the Holy See for a final sentence, declare such a marriage when contracted without the promises to be void.[66]

The faculty of dispensing from the impediment of mixed religion is specifically different from that of dispensing from disparity of worship, and therefore the one does not supply the other.[67] But the cumulative faculty is thereby not curtailed.[68] If a dispensation from disparity of cult is granted to a couple already married, renewal of the consent is required, unless a *sanatio in radice* has to be applied.[69]

If the pastor, when asking for a dispensation, is in doubt whether a dispensation from disparity of worship or from mixed religion is required, let him *ask for both* and explain the reason for his request.[70] It may happen that in the meantime new proofs either for or against the validity of Baptism are brought to his attention. If the doubt against the fact or the validity of Baptism is so strong that it almost amounts to a certainty, the dispensation from disparity of cult should be applied. But if the doubt disappears in favor of the validity of Baptism, the dispensation from mixed religion must be used.

(Popper was a Jewish baron of Hungary) is proof of this, for a dispensation was denied (*Arch. f. K.-R.*, Vol. LV, 161, 361; Leitner, *l. c.*, p. 275), although an enormous sum had been offered.

66 *S. O.*, June 21, 1912 (*A. Ap. S.*, IV, 443).

67 S. O., April 29, 1842; March 18, 1891 (*Coll.*, nn. 948, 1750).

68 Cfr. can. 1049.

69 S. O., June 12, 1850 (*Coll.*, n. 1044).

70 Cfr. S. O., April 29, 1842 (*Coll.*, n. 948; Putzer, *l. c.*, p. 394). Lehmkuhl's assertion (*Theol. Moral.*, II, 752, 3) that the dispensation from mixed religion hypothetically and tacitly contains that from disparity of cult, cannot easily

SACRED ORDERS

CAN. 1072

Invalide matrimonium attentant clerici in sacris ordinibus constituti.

A marriage is invalid when attempted by clerics in major orders.

This brief canon has a lively history and must be compared with can. 132, in connection with which we have given a sketch of clerical celibacy in the Latin and Oriental Churches. The *Oriental practice,*[71] which permits clerics to marry before they are ordained subdeacons, is not admitted in the United States, and no priests of the Oriental Rites are allowed to exercise the sacred ministry here unless they obey the law of celibacy.[72]

In its present extent this impediment was fixed for the *Latin Church* by the IInd Lateran Council, A. D. 1139, which made it obligatory also on subdeacons and thus raised this latter order to the rank of a higher or sacred order. Although attempts were made to abolish celibacy at the councils of Constance and Bâsle, the Church has always upheld this prerogative of her clergy.

The impediment arises from a sacred or higher order validly and willingly received. We say *validly,* for the impediment cannot exist, unless it has a foundation, and there is no foundation if the ordination was invalid.[73] But ordination may be valid but received *unwillingly.*

be admitted. For the negative answer of the Holy Office to the question: "*Utrum intendat S. Sedes dispensare etiam super impedimento disparitatis cultus quando dispensat partem catholicam ad contrahendum cum parte acatholica*" would seem to preclude such an assumption.

71 Bened. XIV, "*Etsi pastoralis,*" May 26, 1742; "*Eo quamvis,*" May 4, 1745; "*Anno vertente,*" June 19, 1750; Milasch-Pessic, *K.-R. d. abendländ. Kirche,* 1905, p. 598.

72 S. C. P. F., Oct. 1, 1890; June 13, 1891; May 10, 1892.

73 Reiffenstuel in Reg. Juris 52 in 6°; Engel, III, 3, n. 12.

Can. 214 declares a validly ordained clergyman free from the obligation of celibacy if ordination was administered under compulsion or grave fear.[74]

The *effect* of this impediment is that it invalidates a marriage to be contracted, but does not dissolve a marriage already validly contracted. Therefore the wife of a cleric who has received higher orders with Apostolic dispensation [75] cannot contract a new marriage.[76]

The *source* of the impediment is not the vow attached to celibacy,[77] but the *ecclesiastical law* which forbids sacred ministers, for reasons of the public good, to contract marriage. The vow is only an accessory, and, we may say, a safeguard of the law which imposes the obligation of continency. Therefore this impediment is specifically distinct from that of solemn profession.

Although this impediment is *iuris ecclesiastici,* and binds only the clergy of the Latin Church,[78] yet dispensations from it, especially when the diaconate is involved, are exceedingly rare.* This may be seen from can. 1043, which excepts from the power of dispensation the case of priests. If such a case comes before a pastor or confessor (danger of death), nothing can be done but to impart absolution, provided the penitent is properly disposed and agrees to separate from the woman and repair the scandal he has given.

74 Cfr. S. C. C., Yprens., Dec. 16, 1719 (Richter, *Trid.,* p. 201 f., n. 1).

75 Can. 132, § 3.

76 Sanchez, *l. c.,* l. VII, disp. 40, nn. 2, 6.

77 A vow was maintained by Sanchez, *l. c.,* VII, disp. 27, n. 9; but the majority of authors defend the view stated in the text; cfr. Wernz, IV, p. 534 (ed. 1); Scherer II, 367.

78 Whether a marriage attempted by a cleric of the Oriental Rite in the U. S. before subdeaconship would be invalid, has never been decided. Practically the question is useless, because such a priest could not exercise the ministry.

* See Richter, *Trid.,* p. 202, n. 2.

RELIGIOUS PROFESSION

CAN. 1073

Item invalide matrimonium attentant religiosi qui vota sollemnia professi sint, aut vota simplicia, quibus ex speciali Sedis Apostolicae praescripto vis addita sit nuptias irritandi.

Marriage is null also if attempted by religious who have taken *solemn vows,* or simple vows that have the force of invalidating marriage by special disposition of the Holy See.

After the religious state had spread and experienced a certain relaxation, especially in Spain, there were not a few cases of attempted marriage, with which the Church was prompt to deal. The marriages of religious were declared "unlawful and sacrilegious unions," "incestuous and adulterous," and condemned by civil and ecclesiastical laws.[79] The severe denunciations by Popes Siricius (384–399) and Innocent I (401–417) seem to indicate that they regarded solemn vows as an annulling impediment. They were formally declared to be such by the IInd Lateran Council, 1139.[80] Boniface VIII, in his much-discussed Decretal,[81] added nothing new to the intrinsic force of the prohibition, but merely declared that the distinction between solemn and private vows was introduced with the sanction of the Church (*constitutione ecclesiae*). It was the view of the School,[82] as well as the Roman practice up to the time of the foundation of the *Society of Jesus,* that vows taken either explicitly or implicitly in an approved religious order were solemn and

79 Cfr. Coustant, *Epp. Rom. Pont.,* pp. 629, 688, 755.

80 C. 40, C. 27, q. 1.

81 C. un. 6°, III, 15; cfr. c. 9, X, III, 32.

82 Cfr. Bern. Pap., *Summa,* ed. Laspeyres, p. 149; Tancred, *Summa,* ed. Wunderlich, p. 20.

constituted a diriment impediment to marriage. When the Jesuits drew a distinction between solemn and simple vows among their members, it became necessary to have a declaration by the Apostolic See that the members of the Society with simple vows were true religious. The consequence was that Gregory XIII attached to these simple vows the same effects, as concerns the vow of chastity, which flow from solemn vows.[83] Hence the clause in our Code: "*by special disposition of the Holy See.*"

1. The foundation of this impediment is *solemn profession,* which, like the impediment itself, originates in the sanction of the Church and is therefore *iuris ecclesiastici.* If *simple vows* have the power of invalidating marriage, this is not by the common law of the Church, but by a special ruling of the Apostolic See. By common law only those religious orders in which solemn vows are taken, and in these orders only those members who have pronounced solemn vows, are affected by this impediment.

2. For solemn profession to induce this impediment, it must be made validly, according to the conditions established in our Code.[84] If the solemn vow was dispensed from, there is no effect invalidating marriage.

3. There is a *specific difference* between the impediment arising from sacred orders and that attached to solemn profession, owing to the fact that they have a different foundation, inasmuch as sacred orders constitute a marriage impediment not by reason of the concomitant vow of chastity, but merely by ecclesiastical law; whereas solemn profession is an impediment by reason of the vow

83 Greg. XIII, "*Quanto fructuosius,*" Feb. 1, 1583; "*Ascendente Domino,*" May 25, 1584.

84 Cfr. can. 572 and our Commentary, Vol. III, p. 254 ff.; S. C. C., March 26, April 9, 1718 (Richter, *Trid.*, p. 255, n. 93).

itself, and indirectly in virtue of the ecclesiastical law that sets up the distinction between solemn and simple vows. The consequence is that one who is in sacred orders, and at the same time solemnly professed, is bound by two impediments, and the Ordinary who may enjoy the faculties of dispensing from impediments *iuris ecclesiastici* would have to "cumulate" the faculties.[85] Note that although the Holy See may dispense from this impediment, yet it does so only in very rare cases and always restricts the dispensation to the one marriage for which dispensation is granted.[86]

4. The decretals[87] as well as our Code[88] attach a further effect to solemn profession, *viz.*, the *dissolution of a marriage which is ratified* but not yet consummated. For that purpose a space of two months was generally granted, during which both parties were free to consummate the marriage or not. After the lapse of this period the party who refused to render the *debitum coniugale* could be compelled by the ecclesiastical judge either to render it, or to embrace the religious state and make solemn vows.[89] In order, however, that the other party who is unwilling to enter religion need not wait four years (one year's novitiate and three years of temporary profession), recourse to the S. C. Rel. may be had to permit acceleration of solemn profession. Now-a-days no one bound by the marriage bond can be validly received into any religious order without an Apostolic indult.[90] Therefore after the very first moment of a valid union, the case must be brought before the Apostolic See,

85 S. O., July 1, 1891 (*Coll. P. F.*, n. 1758): "*Monialis aegrotans in concubinatu vivens cum diacono,*" in which case can. 1043 may be applied.

86 De Smet, *l. c.*, p. 348.

87 C. 10, X, III, 32.

88 Can. 1119.

89 S. C. C., Feb. 3, 1725; Leitner, *l. c.*, p. 191.

90 Can. 542,; cfr. S. C. super Statu Reg., Jan. 24, 1861.

which will demand proof of non-consummation. After this has been duly furnished, the party that enters a religious institute will be told to make solemn profession as soon as the Holy See commands. After the solemn profession the marriage is dissolved, because no dispensation is needed for that purpose.

In the case of a *consummated marriage* the bond cannot be severed by solemn profession and neither party can be received into a religious institute without the other's consent. Supposing the marriage was consummated and the wife enters a religious institute with papal permission and the consent of her husband, who remains in the world and takes the simple vow of chastity; may he marry again after the death of his wife? The vow of chastity seems to be against him; but this vow must be regarded as conditional,— conditioned, namely, by the state of marriage and the religious state of the wife. Both conditions being removed, the husband is free to marry again without a dispensation, unless, indeed, his vow was an absolute one of perfect chastity.[91]

ABDUCTION (RAPTUS)

CAN. 1074

§ 1. Inter virum raptorem et mulierem, intuitu matrimonii raptam, quandiu ipsa in potestate raptoris manserit, nullum potest consistere matrimonium.

§ 2. Quod si rapta, a raptore separata et in loco tuto ac libero constituta, illum in virum habere consenserit, impedimentum cessat.

91 Cfr. Bened. XIV, *De Syn. Dioec.*, XIV, 12, 16; Wernz, *l. c.*, IV, p. 564, (1 ed.); can. 1058; can. 1309. Concerning the penalties incurred by clergymen and religious attempting marriage, see can. 2388: "*Excommunicatio latae sententiae Sedi Apost. simpliciter reservata.*"

§ 3. Quod ad matrimonii nullitatem attinet, raptui par habetur violenta retentio mulieris, cum nempe vir mulierem in loco ubi ea commoratur vel ad quem libere accessit, violenter intuitu matrimonii detinet.

§ 1. Between the abductor and the woman abducted with a view to marriage there can be no (valid) marriage as long as she remains in the power of the abductor.

§ 2. If the abducted woman, having been separated from the abductor and restored to a place of safety, consents to have him for a husband, the impediment ceases.

§ 3. As far as the nullity of marriage is concerned the violent detention of a woman is equivalent to abduction, when, namely, a man violently detains her with a view to marriage, in the place where she dwells or to which she has repaired of her own accord.

It is not necessary to cite the rather confused Roman law [92] on the subject, or ancient ecclesiastical discipline, which has not been uniform.[93] As an impediment of *ecclesiastical law* abduction was formulated by the Council of Trent.[94] Of course, it *is* founded upon natural law, inasmuch as it affects the freedom of consent. But the formal side of the impediment is strictly ecclesiastical or human.

The Code mentions two kinds of abduction: abduction proper and detention (§ 3). But both amount to the same and have the same effect. The *requisites* are the following:

1. The *object* of abduction is a woman, not a man, although boys, too, may be "kidnapped." It is immaterial whether the woman be good or bad, young or old,

92 Cfr. Cod. IX, 13; Nov. 143; Nov. 150.

93 Freisen, *l. c.*, p. 590; the plainest canon is that of a synod of Meaux, VIIIth century (Mansi, *Coll. Conc.*, XIV, 834 can. 60); cfr. c. 7, X, V, 17; Bernard. Pap., *Summa, ed. cit.*, p. 231.

94 Sess. 24, c. 6, *de ref.*

rich or poor, marriageable or not, whether betrothed to the abductor or not. All these qualities are purely accidental.[95]

2. The *abduction* as well as the *detention* must be *violent*. Now abduction means removal from one place to another even though it be in the same town or house, assuming that the latter has several apartments.[96] *Detention* may take place in the same room, but it must be violent, *i. e.*, effected by physical compulsion, fraud or allurement. It does not matter whether it is perpetrated by the abductor himself or by his accomplices and friends, even if they be the parents of the woman.[97] But violence naturally supposes that the woman does not consent to or connive at the abduction,— hence *nolentem mulierem*, an unwilling woman. If the woman consented to the abduction, but afterwards repented, there would be no violence,[98] though there may be violent detention. But the unwillingness to consent must be in the woman herself, in other words, though the parents may be opposed to the abduction and to the marriage, if the woman is satisfied, there is no impediment.[99]

3. The *end or purpose* of the abduction or detention must be *marriage* with the abductor or detainer. If the motive were other, for instance, merely *vesanus amor*,[1] or satisfaction, or material gain, the impediment would not arise; therefore the Code says: *intuitu matrimonii*. This is so true that even if the original intention were afterwards changed into that of contracting marriage,

95 Boekhn, IV, 6, n. 54; Gasparri, *l. c.*, n. 621; Wernz, *l. c.*, IV, p. 419 (1 ed.); v. Scherer, II, 380.

96 Santi-Leitner, IV, 1, n. 159.

97 S. C. C., June 25, Aug. 27, 1864 (*A. S. S.*, I, 15 ff.); *Reg. Iuris*, 72 in 6°.

98 Sanchez, *l. c.*, l. VII, disp. 12, n. 7 f.

99 S. C. C., March 5, 1714 (Richter, *Trid.*, p. 252, n. 90); *A. S. S.*, I, 63; Sanchez, *l. c.*, n. 9.

1 S. C. S., *ibid.*

there would be abduction in the canonical sense. This also holds true if one abducts his own *fiancée*, provided the abduction is perpetrated for the purpose of marriage.[2]

4. *Violent abduction* — not detention, because of the *contradictio in adiecto* that would follow — *ceases* as soon as the woman is in a safe place and freely consents to the marriage. Freedom of consent is all that is required, and the impediment is removed as soon as this freedom is restored.[3]

CRIME

CAN. 1075

Valide contrahere nequeunt matrimonium:

1.° Qui, perdurante eodem legitimo matrimonio, adulterium inter se consummarunt et fidem sibi mutuo dederunt de matrimonio ineundo vel ipsum matrimonium, etiam per civilem tantum actum, attentarunt;

2.° Qui, perdurante pariter eodem legitimo matrimonio, adulterium inter se consummarunt eorumque alter coniugicidium patravit;

3.° Qui mutua opera physica vel morali, etiam sine adulterio, mortem coniugi intulerunt.

There can be no valid marriage between:

1.° Those who, during the same legitimate marriage, have committed adultery with and promised marriage to each other or attempted it, even by a merely civil act (*promissio cum adulterio*).

2.° Those who during the same legitimate marriage have committed adultery together and one of them conjugicide (*uno machinante et adulterio*).

2 All the decisions quoted in *A. S. S.*, I, 57 f.; IX, 519 f.; XXI, 593; XXIII, 451 ff. are not to the point, because the girl in the case connived at or consented to the abduction.

3 Concerning the penalty, see can. 2353.

3.° Those who, even without adultery, caused the death of a partner by mutual coöperation, either physical or moral (*utroque machinante absque adulterio*).

This so-called impediment of crime was acknowledged by the synod of Tribur, A. D. 896, whose 40th canon was received into the Decree of Gratian.[4] The Decretals[5] also mention it, and the canonists have explained it more elaborately. The reason for making crime an impediment, Sanchez says,[6] is to preclude the hope of a future marriage to adulterous conjugicides. It is founded on natural law,[7] though as a formal impediment it is *ecclesiastical.*[8] As it contains a *threefold distinct species,* this must be plainly indicated in the petition for dispensation, as explained under can. 1053.

The *first species* is *adultery with a promise of marriage.* This impediment is incurred only if:

1. The act of *adultery* is complete and formal, that is if perfect carnal intercourse (*copula per se apta ad generationem*) has taken place, with or without subsequent pregnancy, and one of the parties at least must be aware of the married state of the other. James, an unmarried man, has carnal intercourse with Gemma, who is lawfully married to Brutus. If James knows nothing of Gemma's being married, there is no formal, but merely material, adultery. It does not matter whether Gemma is separated or civilly divorced from her husband, or whether the latter had consummated his legal marriage with Gemma, as long as a valid marriage tie exists between the two. However, it might happen that a civilly divorced woman, in our case Gemma, would not regard

4 C. 4, C. 31, q. 1.

5 Cfr. X, IV, 17; V. 16.

6 *L. c.,* l. VII, disp. 79, n. 1.

7 The Mosaic Law in Lev. 20, 10; Deut. 22, 20. The Roman Law in l. 6, Dig. 48, 5; l. 4, Cod. IX, 9; Nov. 134, c. 12.

8 Benedict XIV, "*Aestas,*" Apr. 11, 1757, n. XV.

it as adultery, but merely as fornication, to have intercourse with an unmarried man. In that case there would be no formal adultery.

2. The second condition for the impediment is a *mutual promise of, or an attempt at, marriage.* This promise must be a serious, free and mutual promise, the object of which is marriage, not "free love," or something else. Neither would a conditional promise, as long as the condition is not verified, be sufficient to induce the promise or impediment. Of course, such a promise is neither licit nor valid. Thus in our case James (unmarried) may have committed adultery with Gemma (married) and promised to marry her after the death of her husband. The latter dies a natural death.[9] In that case there would be the impediment of crime if adultery was committed and a promise of marriage made. However, if the promise was conditional, for instance, "*provided* Brutus dies a natural death," or "*provided* he leaves an insurance policy of $5000," some authors [10] say that a conditional promise not verified before the death of the innocent party must be looked upon as annulling the promise, and that there would be no impediment. It is difficult to understand this reasoning; for certainly a conditional consent is possible and admissible, and on the other hand the conditions mentioned above are possible and admissible and may certainly be combined with a serious,[11] externally manifested and mutual promise of future marriage. Equal to a promise of marriage (which, of course, need not be made in the form of an engagement), is an *attempted marriage.* To attempt

9 S. C. C., March 26, 1746 (Richter, *Trid.*, p. 268, n. 109).

10 Gasparri, *l. c.*, n. 648; Wernz, *l. c.*, IV, Vol. 2, p. 404, n. 524.

11 Cfr. Sanchez, *l. c.*, VII, disp. 79, n. 11 f. Wernz admits a condition, but one to be verified before death; — why? c. 7, X, IV, 17, does not militate against our view.

marriage here means not merely to plan or prepare for marriage, but to contract marriage invalidly by words expressing consent or by some other sign involving a promise of consent. Therefore, even if a civil divorce was granted, and polygamy could not be charged, and the marriage was performed before the civil magistrate, the Church would look upon this second (civil) marriage as a mere attempt. But this attempt would amount to a promise of marriage according to ecclesiastical usage, and would suffice to constitute the impediment of crime, provided adultery had been committed.

3. There is a third condition to be considered; the adultery and the promise of marriage must occur during the same lawful marriage, *perdurante eodem legitimo matrimonio*.[12] To illustrate: James is lawfully married to Gemma, but commits adultery with Anna, without promising to marry her. After Gemma's death he legally marries Olga, and during this marriage promises to marry Anna, but does not commit adultery with the latter. There is no impediment of crime between James and Anna because adultery and promise must be related to one and the same marriage. On the other hand, it is immaterial whether adultery precedes or follows the promise, provided only the promise has not been revoked before the adultery was committed.[13]

The second species of the impediment is *adultery with conjugicide* perpetrated by one of the accomplices.

1. The *adultery*, as described above, must precede the death of the innocent party, but it is not necessary that it precede the plotting — *machinatio mortis*.

2. The *death* of the innocent party must be the actual result of an act performed by one of the accomplices.

12 Cfr. cc. 6, 8, X, IV, 7.

13 Sanchez, *l. c.*, l. VII, disp. 79, nn. 7, 34.

This act may be physical or moral, as, for instance, counselling, commanding, hiring an assassin, in a word any co-operation the result of which is death.[14] Neither is it required that, *e. g.*, Gemma (married), who has committed adultery with James (unmarried) should know about the act James intends to perpetrate.[15] But the object of the murder must be marriage with the adulterous party, or with the party that is made free by the death thus caused. Hence if Brutus would kill Gemma simply because she had committed adultery with James, and for the sole purpose of revenge, no impediment would exist.[16]

3. The adultery and the killing must occur during the *same legitimate marriage*. Therefore, in the case posited, James must kill Brutus after having committed adultery with Gemma, whilst the latter was lawfully married to Brutus.

The lawgiver constantly uses the term "*perdurante eodem legitimo matrimonio.*" A legitimate marriage may exist also between unbaptized persons, and hence this impediment would seem to affect non-baptized persons indirectly, if they wish to contract marriage with a Christian, or rather, a Catholic. But if the crime is committed before Baptism, and both parties are afterwards baptized, the impediment no longer exists, because the Sacrament wipes out all crimes.[17]

The third species is *conjugicide* alone when the death results from the effective co-operation of the two parties.

1. Adultery is not required in this case.

2. But there must be a *conspiracy* of two accomplices against the life of one living in valid marriage. This

14 Mere ratification or approval would not be sufficient.

15 C. 1, 3, 7, X, IV, 7.

16 S. C. C., Sept. 28, 1726 (Richter, *Trid.*, p. 268, n. 108).

17 S. C. P. F., Aug. 23, 1852, ad 5 et 6 (*Coll.*, n. 1079).

conspiracy must be *mutual* and actual, not a mere ratification or approval.[18]

3. Death must actually *follow* this physical or moral conspiracy.

4. Finally, the intention of killing the husband or wife must be directed to *marriage* with the party freed by the other's death. Though this is an implied condition only, and is not expressed in the law, it is reasonably presumed, at least in *foro externo*.[19] For the rest, the intention can often be shown to have existed from suspicious familiarity, love letters, presents, etc.

Since this impediment contains a threefold species, it may be multiplied according to its combination with one or more of said species.

If both parties are married, this aggravates the circumstance, although it does not multiply the species.

Since this impediment was set up to preserve the sacredness of marriage and for the public welfare, it follows that *ignorance of the impediment is no excuse from incurring it.* This view is not only extrinsically but also intrinsically the more probable.[20]

The civil codes of the United States and of England do not treat crime as an impediment proper, but merely as a reason for divorce.[21]

CONSANGUINITY

It is not necessary to restate here the *Hebrew law*[22] concerning the various degrees of consanguinity. The *Roman Law* may be alleged only in so far as there

18 Panormit. ad c. 3, X, IV, 7, n. 4.

19 Schmalzgrueber, IV, 7, 2, 55; Wernz, *l. c.*, IV, Vol. 2, p. 408, n. 528.

20 Boekhn, IV, 7, n. 17; De Angelis, IV, 7, p. 188; De Smet, *l. c.*, p. 401, says that this is the only view to be followed *in foro externo*. Dispensation from the 2nd and 3rd species are granted but rarely. Benedict XIV, "*Aestas,*" n. XV.

21 Bishop, *l. c.*, I, § 53, 65.

22 Lev. 20, 21 ff.

is a distinction between the manner in which it reckons the degrees in the collateral line and the ecclesiastical *computus*. The latter says that brother and sister are related in the first degree of the collateral line, whereas the Roman lawyers [23] maintained that they are related in the second degree. It was the *Germanic law* that chiefly influenced the ecclesiastical style of computing the degrees in the collateral line. The Germanic tribes, taking the human body as representing the distance of the clans, counted from the head downward to the last knuckle of the fingers, thus finding seven degrees within which the *prosapia* (*Sippe*) was confined, and marriage within which was prohibited.[24] Pseudo-Isidor strenuously defended these six or seven degrees and gained his point, until the IVth Lateran Council established the fourth degree in the collateral line as the last for the diriment impediment.[25] Thus the matter stood until now. Our Code takes off one more degree.

EXTENT OF CONSANGUINITY

CAN. 1076

§ 1. In linea recta consanguinitatis matrimonium irritum est inter omnes ascendentes et descendentes tum legitimos tum naturales.

§ 2. In linea collaterali irritum est usque ad tertium gradum inclusive, ita tamen ut matrimonii impedimentum toties tantum multiplicetur quoties communis stipes multiplicatur.

§ 3. Nunquam matrimonium permittatur, si quod subsit dubium num partes sint consanguineae in aliquo

23 Fr. 1, 3, Dig. 38, 10.

24 There is still a dispute concerning the expression *usque ad 7 gradum*, whether it includes only six degrees; cfr. Freisen, *l. c.*, 411 ff.; v. Scherer II, 299.

25 C. 8, X, IV, 14.

gradu lineae rectae aut in primo gradu lineae collateralis.

§ 1 determines the diriment impediment in the *direct* line: *"In the direct line consanguinity invalidates marriage between all ascendants and descendants, whether legitimate or natural."*

Johannes Andreae says in his *"Lectura Arboris,"* [26] that consanguinity is a bond between persons descending from the same stock, contracted by carnal propagation. In other words, it is relationship that exists between persons who have the same blood in their veins. This relationship is confined within certain limits. There is no *processus in infinitum,* else we might say that all men are related to one another, as all are descended from Adam and Eve.[27] Yet in the direct line there is a certain indefinite relationship, which the Roman law wisely restricted to the seventh degree, adding that beyond that limit human nature does not permit man to exist.[28] Our Code does not state any degree, no doubt because it was deemed superfluous to make an observation as to further degrees.

We now return to can. 96, which says that *consanguinity is reckoned by lines and degrees.* The *line* is nothing else but the series of persons descended from the same stock. The degree is determined by the number of generations or persons forming the line. The line has been likened to a ladder,— the original image of ancestry, — which contains two sides and a more or less well defined number of degrees. The line may be *direct* or indirect, *i. e.,* collateral. The former subsists between persons of whom one is descended in a direct line from the other,

26 Cf. Friedberg, *Decretum Magistri Gratiani,* p. 1125.

27 Cfr. Smith, *Marriage Process,* 1892, p. 115.

28 Fr. 4, Dig. 38, 10.

either upwards in the direct ascending line, or downwards in the direct descending line. Add now the *degree* or measure of distance in the relationship of one person to the other, and recall can. 96, § 1: *"In the direct line there are as many degrees as there are generations, or as there are persons, not counting the common stock,"* and you will have the following scale:

James

Descending Line	*Ascending Line*
1	1
Son (*Filius*)	Father (*pater*)
2	2
Grandson (*Nepos*)	Grandfather (*Avus*)
3	3
Great grandson (*Pronepos*)	Great grandfather (*Proavus*)
4	4
Great great grandson (*Abnepos*)	Great great grandfather (*Abavus*)

James is therefore related to the son in the first degree of the descending line, and to the father in the same degree in the ascending line. To the great great grandfather James is related in the fourth degree, because there are four generations: great grandfather, grandfather, father, son, or if you prefer, there are five persons, not counting the common stock, or the great great grandfather.

The Code extends this relationship to any *indefinite degree,* and to *natural* as well as *legitimate* descendants and ascendants. The term "natural" here means persons born out of legitimate wedlock, no matter whether of

a fornicarious (strictly natural) or adulterous or sacrilegious intercourse.

§ 2 establishes the extent of the impediment arising in the collateral line as follows: "*In the collateral line matrimony is invalid to the third degree inclusively,* in such a way, however, that the impediment is multiplied only as often as the common stock is multiplied."

Returning to lines and degrees, the reckoning is almost the same. The line is called *collateral* because, although the collateral relations descend from the same stock or ancestor, yet they differ in this that they do not descend one from the other, but branch out from the common stock. Again we must return to can. 96, § 3, which determines the degrees: "*In the oblique (or collateral) line, if both sides of the line are equal, there are as many degrees as there are generations on one side; if they are unequal, there are as many degrees as there are generations on the longer side.*" Here then we have an equal and uneven collateral line, *i. e.* one consisting of uneven steps. For the unequal line, *linea collateralis inaequalis,* is one in which the relationship to the common ancestor is more distant on the one side than on the other, and in the latter case the more remote degree determines the degree of relationship. But it must be added that the line and degrees are reckoned in the ascending as well as the descending line. Unfortunately, in English, there are no names to designate the further degrees. Here are the *line and degrees:*

I. Collateral Ascending Line

1. *Paternal Line*

1st degree: Uncle, *patruus* (father's brother)
Aunt, *amita* (father's sister)

2nd degree: Granduncle, *patruus magnus*
Grandaunt, *amita magna*
3rd degree: Great granduncle, *propatruus*
Great grandaunt, *proamita*

2. *Maternal Line*

The same names in English, with the addition of paternal or maternal uncle or aunt. In Latin:
1st degree: *avunculus, matertera;*
2nd degree: *avunculus magnus, matertera magna;*
3rd degree: *proavunculus, promatertera.*

II. Collateral Descending Line

1. *Paternal Line*

1st degree: brother, *frater*
sister, *soror*
2nd degree: first cousins, nephew, *patrueles,* whose fathers are brothers,
first cousins, niece, *amitini,* whose father and mother are brother and sister
3rd degree: second cousins, *patrueles magni*
amitini magni

2. *Maternal Line*

The same terms in English; in Latin, first cousins are called *consobrini* if their mothers are sisters, and the 3rd degree or second cousins are called *consobrini magni.*

III. Collateral Unequal Line

John (common stock)

1st degree: brother
2nd degree: nephew (first cousin)
3rd degree: grand nephew (James)

1st degree: sister
2nd degree: niece (Gemma)

Therefore James would be second cousin to Gemma, or, in Latin, *in tertio gradu tangente secundum lineae collateralis inaequalis.* For there are three persons descending in the longer line from John, and two persons descending from the same John in the nearer line; but according to can. 96, § 3, the reckoning is made according to the longer series.

IV. Multiplication of Relationships

Suppose James and John Murphy, brothers, marry Gemma and Olga, who are first cousins. The children of these two couples will be related to each other in the second degree on the father's side, and in the third degree on the mother's. For as brothers James and John are related through the common father, Murphy, in the first degree, and consequently their children in the second degree. Gemma and Olga have the same grandparents and are therefore related among themselves in the second degree. Add now the one degree accruing to their children, as stated above. Hannah, the daughter of James and Gemma, and Francis, the son of John and Olga, are related in the second and third degree, or the impediment is multiplied because of the multiple common stock.

Now this multiple impediment, arising from a double common stock, must be expressed in the petition for a dispensation. For instance, two persons are related in the second degree (first cousins) and their grandparents were also related in the second degree. Hence they are related in the second and fourth degree of the collateral equal line. If two brothers marry two sisters, their offspring are related to one another in the double second degree of the collateral line.[29]

§ 3 states that "*Matrimony is never to be permitted*

29 S. O., March 11, 1896; Feb. 22, 1899 (*Coll. P. F.*, nn. 1920, 2049).

when there is a doubt whether the parties are related in some degree of the direct line or in the first degree of the collateral line."

This is the practical answer to the query whether the impediment of consanguinity arising from the direct line, either ascending or descending, or from the first degree of the collateral line, is of natural, or of merely positive, *i. e.,* ecclesiastical, law. The question has been disputed. While the first degree of the direct line has been considered by all as forbidden by natural law, regarding the remote degree of the direct line, and the first degree of the collateral line (brother and sister), opinions were divided. However, it is a physiological fact that the intermarrying of near relatives often produces bad results. Besides, reverence and piety should prevent near kinsmen from commingling their blood. And, finally, the social order requires the spread of social bonds beyond the narrow limits of clans and tribes. New and fresh branches invigorate the blood and harmonize the diverse elements of society. Hence Innocent III, although exempting the Gentiles from the observance of the law of consanguinity in the more remote degrees of the collateral line, would include them in the first degree.[30]

The intention of the Church is plainly stated in § 3 of can. 1076. She is not wont to dispense in the whole direct line, nor in the first degree of the collateral line.[31] And this holds good also in case the bride or groom is the natural sister or brother of the other party.[32] A case was proposed to the S. C. Concilii concerning a girl

30 C. 8, X, IV, 19; *Trid.*, sess. 24, c. 5, *de ref.;* Wernz, *l. c.*, IV, n. 413 f.

31 S. O., Dec. 9, 1874 (*Coll.*, n. 1427, Vol. 2, p. 87).

32 S. C. C., Dec. 14, 1793 (Richter, *Trid.*, 6. 261, n. 98), in which decision we read that Rome never granted dispensations from the first degree; example: the Duke of Richmond and Mary, daughter of Henry VIII.

supposed to be spurious or natural, who was sought in marriage by a young man. Rumor had it that she was his sister, born out of lawful wedlock by a domestic servant of his father. Several witnesses testified to the fact that the girl was the offspring of the father whose legitimate son asked her for his wife. Therefore the petition was answered negatively.[33] Infidels married in the direct line or in the first degree of the collateral line to converts, would have to separate, unless they were and are in good faith and greater evils would result from a separation.[34]

AFFINITY

Can. 1077

§ 1. Affinitas in linea recta dirimit matrimonium in quolibet gradu; in linea collaterali usque ad secundum gradum inclusive.

§ 2. Affinitatis impedimentum multiplicatur:

1.° Quoties multiplicatur impedimentum consanguinitatis a quo procedit;

2.° Iterato successive matrimonio cum consanguineo coniugis defuncti.

This impediment, as described in the Code, is newly formulated. Its foundation *is valid marriage,* whether it be only ratified, or both ratified and consummated, as stated in canon 97. The impediment can no longer arise from carnal intercourse outside of marriage.

§ 1 says: *"Affinity in the direct line annuls marriage in any degree; in the collateral line it annuls it to the second degree inclusively."*

Can. 97 determines the extent of affinity as follows:

33 S. C. C., Nov. 23, 1805 (Richter, *l. c.,* n. 99).

34 Leitner, *l. c.,* p. 206.

It exists only between the man and the blood relations of the woman, and likewise between the woman and the blood relations of the man. It is reckoned in this wise, that the blood relations of the man are related to the woman by affinity in the same line and the same degree, and *vice versa.* Suppose James is married to Gemma, and after the latter's death wishes to marry again. He cannot validly marry: in the *direct line* Gemma's mother, mother-in-law (*socrus*), or grandmother (*prosocrus*), nor Gemma's daughter-in-law (*privigna*), nor the latter's daughter, etc. In the collateral line James can marry neither Gemma's sister, nor aunt (*amita*), nor niece, nor first cousin. Conversely, Gemma cannot marry any blood relation of James in the direct line *usque in indefinitum,* and in the collateral line she cannot marry James's brother, uncle, nephew, or first cousin.

The common English and Latin names for the various degrees of affinity may be mentioned here:

father-in-law, *socer*	mother-in-law, *socrus*
son-in-law, *gener*	daughter-in-law, *nurus*
brother-in-law, *sororius*	sister-in-law, *glos, fratria*
stepfather, *vitricus*	stepmother, *noverca*
stepson, *privignus, filiaster*	stepdaughter, *privigna, filiastra*

The law texts which refer to our subject mention the following relations between whom no valid marriage can be contracted: a man cannot marry his brother's wife,[35] nor his mother-in-law, nor the first cousin of his wife, nor his uncle's daughter or stepdaughter, nor any relative whom he has defiled by carnal intercourse or married.[36]

35 C. 11, C. 27, q. 2. Innocent III permitted, for a time, the newly converted Livonians to marry the brother's wife, according to the Mosaic Law (Levir-marriage), but in future they should abstain from the practice (c. 9, X, IV, 19).

36 C. 8, C. 35, q. 2 et 3, c. 20, C. 35, q. 7, savors rather of illicit affinity.

Here the old theory of the foundation of affinity is transparent, yet the addition "*aut uxorem duxerit*" may be construed as fitting the impediment of the Code. Besides, the text does not go beyond the second degree, but, like the Code, limits affinity in the collateral line to the second degree, though it admits of no restriction in the direct line, ascending as well as descending.

§ 2 says that the impediment of affinity is *multiplied:*

1.° *As often as the impediment of consanguinity, from which it originates, is multiplied;*

2.° *By successively repeated marriages with blood relations of the deceased consort.*

The *first reason* for multiplication is therefore to be gauged by can. 1076, § 2, which says that the impediment is multiplied only as often as the common stock is multiplied. This is evident, because affinity supposes consanguinity of either husband or wife, and therefore blood-relationship naturally reflects on affinity. However, affinity does not beget affinity, so that the relatives of the man do not become relatives of the woman's relatives, or *vice versa.*[37]

The *second reason* for a multiplied affinity arises from repeated marriage with a kinsman of the deceased consort. Therefore if James, after his wife's (Gemma's) death, would marry her sister (Anna) or her niece (Olga) or her first cousin, affinity would not be multiplied, because by the first marriage James became a relative only of Gemma's sister, niece, or cousin; and in this consists the simple impediment of affinity. But if James, after the demise of Anna, whom he married after Gemma's death,

37 Cfr. O'Hara, *The Laws of Marriage simply explained according to the New Code,* Philadelphia, 1918, p. 59.

would marry Olga, a niece of Gemma and Anna, the impediment would be multiplied. This appears to be certain. The Code says *successive,* which simply precludes polygamy.

Affinity in its whole latitude, whether in the direct or collateral line, is an impediment of merely ecclesiastical law, as Benedict XIV says.[38] However, observes the same Pontiff, so far it has never happened that the Pope dispensed from the first degree of the direct line. Since it is a merely ecclesiastical impediment, those not baptized are not subject to it. However, according to a declaration of the Holy Office, after Baptism this affinity, though contracted in infidelity, becomes a marriage impediment, in virtue of which infidels become subject to the Church and her laws.[39] And since in some missionary countries it frequently happens that a brother marries the wife of his deceased brother, the faculty of dispensing from the first degree in the collateral line was and is generally granted to missionaries.[40]

The *civil laws* of different countries vary as to consanguinity and affinity. The Revised Statutes of Missouri (Sec. 4312) ordain as follows: "All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as of the whole blood, and between uncles and nieces, aunts and nephews, first cousins, white persons and negroes, are prohibited and declared absolutely void; and this prohibition shall apply to illegitimate as well as legitimate children and relatives."

38 "*Aestas,*" Oct. 11, 1757; *De Syn. Dioec.,* IX, 13. 4.

39 Aug. 26, 1891 (*Coll. P. F.,* n. 1766).

40 S. O., Sept. 20, 1854 (*Coll. cit.,* n. 1104); an interesting case of the former impediment is reported in S. O., Sept. 16, 1824, n. 2 (*Coll.,* n. 784).

PUBLIC PROPRIETY

CAN. 1078

Impedimentum publicae honestatis oritur ex matrimonio invalido, sive consummato sive non, et ex publico vel notorio concubinatu; et nuptias dirimit in primo et secundo gradu lineae rectae inter virum et consanguineas mulieris, ac vice versa.

As worded in the text, this impediment is entirely new,[41] since affinity has taken the place of the former impediment of honesty. The text reads: *"The impediment of public propriety (or decency) arises from invalid marriage, whether consummated or not, and from public or notorious concubinage;* and it annuls marriage in the first and second degree of the direct line between the man and the blood relations of the woman, and *vice versa."*

Two foundations are assigned for this impediment: invalid marriage and concubinage.

1. A marriage is *invalid* if there is a *diriment impediment.* Such an impediment may also be established by the civil power, as long as it does not manifestly clash with ecclesiastical legislation. Therefore if the State establishes adoption (see can. 1080), or consanguinity, or affinity, as an impediment, this impediment annuls marriage, and to obey it becomes a matter of public decency or decorum. The text simply says: "from invalid marriage," which certainly affects public honesty. On the other hand a merely *civil marriage* would be invalid if an ecclesiastical impediment, especially clandestinity, would be in the way.

The text says that it makes no difference whether the

41 This is also evident from the lack of any quotations in Card. Gasparri's edition.

invalid marriage has been *consummated or not.* Hence it is immaterial whether there was carnal intercourse between the parties. However, we believe that, from this viewpoint only, leaving aside concubinage, the marriage would have to present the species of a marriage, *figuram seu speciem matrimonii;* otherwise it would be difficult to see the difference between an invalid marriage and concubinage. But the text, by simply saying, *invalid marriage,* supposes that it may be invalid from any impediment, or defect of form, or defect of consent. Not making a distinction, the lawgiver clearly intends to include the whole range of invalid marriages.

2. The impediment, we are told, may arise also from "*public or notorious concubinage.*" The Code offers no definition of concubinage, but evidently adopts the view of canonists. According to these, concubinage is the retention, either in one's own or in a strange house,[42] of a woman[43] for the purpose of continued illicit cohabitation. Hence the essential point is that the unlawful relation is maintained habitually with the same person, whether married or unmarried. If married, the scandal and therefore the violation of public decorum would be greater than if she were single. But the concubinage must be *either* public *or* notorious. It is *public* when the fact is known to the people, or if the circumstances are such that one may and must prudently judge that it will be made known. It is *notorious* after the final sentence of a competent judge — ecclesiastical or civil — given according to the law,[44] or after a judicial confession of

42 The Roman Law (Dig. 26, 7; Cod. V, 27), insisted upon the fact that the concubine must be kept in one's own house, but canonists (cfr. Engel, V, 16, n. 21; Reiffenstuel, V, 16, n. 61) only demand repeated or continuous illicit relations with the same person; cfr. also *Cath. Encycl.,* s. v. "Concubinage."

43 Some add: *cum soluta,* but others speak of either *soluta* or *maritata;* thus Engel, *l. c.*

44 There might be a difficulty between civil and ecclesiastical law on

guilt. This would be notoriety of *law*. By *fact* a concubinage would be notorious if it were publicly known and carried on under such circumstances that it could not be concealed by any artifice or excused by the aid of the law.[45] This is as far as we can explain the nature of the impediment, which must occasion many doubts.[46]

3. In *extent* the impediment of public propriety is limited to the *first and second degree of the direct line*. Hence James, having been married to Gemma, or living with her in public or notorious concubinage, cannot validly marry her mother or grand-mother, nor the latter's daughter or grand-daughter.

SPIRITUAL RELATIONSHIP

As the name indicates, this impediment is based on a sort of spiritual adoption, which, as Nicholas I says, is stronger than legal adoption.[47] The same view was held by the Emperor Justinian and is expressed in a law of A. D. 530.[48] Canonical writers seem to have taken special delight in enlarging this impediment. The Decretals [49] mention various customs, but adopt a milder practice if no contrary custom exists. It must be remembered that, in the Latin Church, Confirmation was not administered immediately after Baptism, but separately at a maturer age, and therefore the impediment of spiritual relationship was extended to Confirmation.[50] But the Italo-Greeks of Calabria and Sicily were bound by the impedi-

account of the matrimony of conscience, and in that case the sentence of the civil judge could not be followed.

45 Cfr. can. 2197.

46 *Am. Eccl. Rev.*, 1918, Vol. 58, p. 486.

47 C. 1, C. 39, q. 3.

48 L. 26, § 2, Cod. V, 4.

49 C. 1, X, IV, 11; the terms *compatres* and *commatres*, which often occur, signify father and mother of the baptized with regard to the godparents, wherefore no valid marriage can exist between the godfather and the mother of the child; c. 1, 6, IV°, 3.

50 *Trid.*, sess. 24, c. 2, *de ref.*

ment arising from both Baptism and Confirmation.[51] The Code has considerably reduced the extent of this impediment, which now arises from baptism only.

CAN. 1079

Ea tantum spiritualis cognatio matrimonium irritat, de qua in can. 768.

The only spiritual relationship that annuls marriage is that mentioned in can. 768.

It arises only from Baptism and exists between the baptizing minister and the baptized person and the baptized person and the sponsor.

Therefore no valid marriage can be contracted:

1.° Between the baptizing minister and the baptized person;

2.° Between the sponsor and the baptized person.

But the parents do not enter into spiritual relationship. Neither the father nor the mother nor the consort of the baptized person contract any spiritual relationship with him, because they cannot be sponsors at all.[52]

The *conditions* required for the impediment are the following:

1. The *Baptism* must be *valid,* because otherwise there would be no foundation for a spiritual relationship.

2. If *Baptism* is conferred *conditionally,* the sponsor contracts spiritual relationship only in case he was sponsor also at the former Baptism; but if he is sponsor *only* at the conditional Baptism, he does not incur the impediment.[53]

It matters not whether Baptism is administered solemnly or privately, if the sponsor or minister perform

51 Benedict XIV, "*Etsi pastoralis,* May 26, 1742, § VIII, n. VI.

52 Can. 765, 3°.

53 Can. 763, § 2.

their parts properly. However, if Baptism was conferred privately without sponsors, and a sponsor was employed only when the solemnities were supplied, the sponsor does not by his assistance at the latter contract the impediment.[54]

3. The *sponsors* must be designated or *appointed* as such either by the one to be baptized, or by his or her parents or guardians, or if these fail, by the minister.[55]

Therefore the formal consent of the sponsors is required; but if they do not formally and manifestly refuse when appointed, their consent may be lawfully presumed. The reason is that the sponsors must take upon themselves certain duties, such as to procure the Christian education of the child in case the parents should die or neglect their obligation.[56]

4. The sponsor must, at Baptism, hold or touch or receive the baptized person from the baptismal font or the hands of the minister.[57] In other words, he must perform the *physical act* which is generally and by custom considered as the conventional sign of sponsorship.[58]

5. If the sponsor acts by proxy, which is permissible, his representative must act like the sponsor, but spiritual relationship is contracted not by the proctor, but by the one whom he represents.[59] Whether the proctor needs to be endowed with the same qualities as the sponsor himself, is not stated in the Code. But we hardly believe that non-Catholics would be admissible as proctors.[60]

54 Can. 762, § 2; S. C. C., May 16, 1711 (Richter, *Trid.*, p. 266, n. 106): The pastor accidentally forgot to write down that the godfather assisted only at the subsequent solemnity, but the sponsor could prove the fact, and therefore the S. C. declared that no impediment existed.

55 Can. 765, 4°.

56 S. O., Sept. 15, 1869 (*Coll.*, n. 1347); Pignatelli, *Consult.*, t. VII, cons. 98, n. 7 f.

57 Can. 765, 5°.

58 S. C. EE. et RR. Regesta, 1592–93, P. 1, p. 39b.

59 Can. 765, 5°; S. C. C., March 15, 1631; Sept. 13, 1721 (Richter, *Trid.*, p. 266).

60 Cfr. can. 1657, § 1.

6. The sponsor must *not belong to any heretical or schismatical sect,* or be excommunicated by either a condemnatory or declaratory sentence, or suffer from infamy of law, or be excluded from legal actions, or be a deposed or degraded cleric.[61] The Holy Office decided that Baptism should be conferred without sponsors rather than with heretical or schismatical ones.[62] If of two sponsors one would be a non-Catholic, he would assist merely as a witness, not as sponsor.[63] From this the conclusion may be easily drawn that non-Catholics, although baptized and apparently acting as godparents, do not contract the impediment, as it is of merely *ecclesiastical law.*

7. Finally it must be noticed that this impediment *can not be multiplied.* Therefore, even if one should be sponsor to several children of the same family, or even of a whole town, the spiritual relationship cannot be multiplied.[64]

The Commission for the Authentic Interpretation of the Code decided, June 2–3, 1918, that the spiritual relationship contracted before Pentecost 1918 ceases to be an impediment further than stated in can. 768 and can. 1076 of the Code.[65] Therefore there is no longer a relationship between the parents and the baptizing minister, nor between the sponsors and the parents of the baptized person, nor any one arising from confirmation, nor any double relation.

LEGAL ADOPTION

The Church accepted adoption as expounded in the Roman Law and made it an ecclesiastical impediment for all countries in which it contained at least the essential

61 Can. 765, 2°.

62 May 3, 1893 (*Coll. P. F.*, n. 1831 and *passim*).

63 S. O., Jan., 1763 (*Coll.*, n. 447).

64 Formerly it was multiplied, if the same sponsor stood for the same child at baptism *and* confirmation.

65 *A. Ap. S.*, Vol. X, 346.

elements of adoption proper.[66] Hence the codes of different countries had to be inspected as to their agreement with the substance of this juridical institution. The Decree of Gratian [67] as well as the Decretals [68] presuppose the Roman notion of adoption.

Adoption was said to imitate nature,[69] because it is a legal act by which persons are assumed as sons and daughters, nephews or nieces, who are not such by nature.[70] It was natural to bestow on such adopted children all the rights of *parentela.* The Romans distinguished perfect or complete from incomplete adoption, calling the former *adrogatio,* and the latter simply *adoptio.* By *adrogatio* one entered into perfect and complete dependance upon, or came under the paternal power of, the adopter. This was the case if a Roman youth who was of age or *sui iuris,* was asked (*rogatus*) whether he was willing to pass into the power of another. Adoption in the strict sense comprised only such children as were not fully emancipated from the power of their natural parents, and hence was not followed by all the consequences attached to *adrogatio.* Both processes required certain conditions, which had to be complied with in order to obtain the civil effects. Chief among these conditions was (a) that either the supreme authority for *adrogatio* or the magistrate for *adoptio* sanctioned the act of adoption; (b) that the adopting person was capable of exercising the paternal power, *i. e.,* no eunuch, and at least eighteen years older than the adopted; and (c) that the adoption was made without conditions and personally, *i. e.,* not by proxy.[71]

66 Benedict XIV, *De Syn. Dioece.,* IX, 10, 5.

67 C. 1, C. 30, q. 3 (Nicholas I, *Ad Consulta Bulgarorum*).

68 C. nn. X, IV, 12.

69 See § 4, *Inst.,* I, 11.

70 Voet, *Comment. in Pand.,* I, 7, 1, t. 1, p. 52.

71 See §§ 4, 9, *Inst.,* I, 11; l. 5, Cod. VIII, 47; ll. 25, 34, Dig. 1, 7.

How far the degrees prohibiting marriage were extended is uncertain. But the *legistae* of the middle ages as well as the canonists [72] distinguished *legal paternity,* legal fraternity, and legal affinity. The first, they held, annulled marriage between the adopting parents and the person adopted and the latter's children to the fourth degree. *Legal fraternity* annulled marriage between the adopted person on the one hand, and the children of the adopter on the other, because these were considered by law brothers and sisters of the adopted. *Legal affinity* extended to the adopter and the wife of the adopted and to the adopted and the wife of the adopter.

This was the status of legal adoption, so far as we can see, under the Roman law. In countries which embodied these notions in their respective codes, the Church held adoption as binding in the ecclesiastical court, no matter whether the civil law had or had not directly enacted it as a diriment impediment. Let us now hear what the Code says.

Can. 1080

Qui lege civili inhabiles ad nuptias inter se ineundas habentur ob cognationem legalem ex adoptione ortam, nequeunt vi iuris canonici matrimonium inter se valide contrahere.

Those who are by the civil law considered as incapable of contracting marriage with each other on account of the legal relationship arising from adoption, are, by canon law, incapable of contracting marriage validly.

Two points are brought out very distinctly in this canon: (1) The Church *accepts* the civil laws concerning adoption in each country; (2) the extent of these

72 Bernard. Pap., *Summa, ed. cit.,* pp. 161, 298; Tancred, *ed. cit.,* p. 38 ff.

laws and their invalidating character does not depend on their conformity with the Roman law, but solely upon the wording and intention of the law as it exists.

Therefore, where the law sets up adoption as a merely prohibitive (impedient) impediment (can. 1059), the Church also regards it as such; whereas in countries which treat adoption as a diriment impediment, the Church binds the faithful to the same extent as the civil law. Whether a country admits all three: legal paternity, legal fraternity, and legal affinity, or one or the other only, depends on the wording of the civil law, and it is wrong to assert that the impediment exists only between the adopter and the adopted.[73] Note, however, that the civil law must not only describe and lay down the rules for adoption, as is done, for instance, in New Jersey,[74] but must explicitly state that the adoption, as described, constitutes a diriment impediment, otherwise, since impediments are restrictive of human liberty, adoption must be regarded either as prohibitive or a merely penal law.

With the exception of New Jersey, our United States care little about this impediment. However, as immigrants may come here from countries where adoption is established as a diriment impediment, we will mention some relevant enactments.

Belgium does not explicitly set up adoption as an impediment, though it acknowledges it as conformable to the Roman law (*Cod. Civ.*, art. 343).

The same is true concerning *Austria* (Cod., art. 179–186).

Germany (*Bürgerl. Gesetzbuch*, art. 459) regards legal paternity as an impediment.

73 Thus O'Hara, *l. c.*, p. 60.
74 Smith, *Marriage Process*, p. 127.

Italy (*Codice Civile,* art. 60,202) treats legal adoption as an explicit impediment.

Spain (*Codigo Civil,* art. 173–180–184) establishes legal paternity and legal affinity as impediments.

Switzerland (*Zivilgesetzbuch,* art. 100, 264, 268) treats legal paternity and legal affinity as impediments.

CHAPTER V

MATRIMONIAL CONSENT

After setting forth the divine and positive laws which negatively determine the capability of persons for the married state, the Code proceeds to consider the personal coöperation of the contracting parties. This is given in the matrimonial consent. Under the same heading certain obstacles to valid consent are pointed out which were formerly treated as impediments. They are: error, servile condition, violence or fear.

The consent may be given by proxy or through an interpreter, who are therefore also mentioned in this chapter.

THE CONSENT ITSELF

CAN. 1081

§ 1. Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus; qui nulla humana potestate suppleri valet.

§ 2. Consensus matrimonialis est actus voluntatis quo utraque pars tradit et acceptat ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad prolis generationem.

This canon merely restates the Roman law, which says: "*Consensus facit nuptias.*" The theory maintaining that the *copula* was required to render the marriage complete has no foundation in law. Hence our text says that

marriage is effected by the legitimate manifestation of the consent of parties who are qualified thereto by law; and this consent cannot be supplied by any human power. The matrimonial consent is an act of the will by which the parties deliver and accept the exclusive and perpetual right to each other's body for the purpose of performing acts apt for the procreation of children.[1]

CAN. 1082

§ 1. Ut matrimonialis consensus haberi possit, necesse est ut contrahentes saltem non ignorent matrimonium esse societatem permanentem inter virum et mulierem ad filios procreandos.

§ 2. Haec ignorantia post pubertatem non praesumitur.

In order that matrimonial consent be possible, it is necessary that the contracting parties at least be not ignorant that marriage is a permanent union between man and woman for the purpose of begetting children. Such ignorance is not presumed in those who have reached puberty.

These two canons establish the absolute necessity of the matrimonial consent, its physiological and physical object (can. 1081), and its bearing on the mental condition of the contracting parties (can. 1082).

1. *Necessity of the Matrimonial Consent.* The matrimonial consent is said to effect the marriage, because it is the will which, proceeding from reason, produces the contract between two persons endowed with reason and will. Hence carnal intercourse is a concomitant adjunct, but not the cause of the marriage; otherwise fornication might be called lawful. Or, as St. Ambrose ex-

1 L. 30, Dig. 50, 17; l. 11, Dig. 23, 1; l. 15, Dig. 35, 1.

presses it: "*non enim defloratio virginitatis facit coniugium, sed pactio coniugalis.*" [2]

This consent — *duorum in idem placitum consensus* [3] — must be given by two persons who are qualified by law to contract marriage. The divine, the natural, and the positive law of the Church have set up certain impediments which have been sufficiently explained in the preceding chapter. Persons who are either relatively or absolutely bound by any of the diriment impediments cannot give an absolutely valid consent, although they may consent conditionally,— provided the impediment be removed.

The term *iure habiles* has a wider scope. It implies the natural capacity of externally manifesting the consent. To speak more precisely — the consent must proceed from a deliberate act of the will and be manifested externally, because, unless so manifested, it cannot be apprehended by men, who are bound to, and led by, the senses. Therefore, the Code says, "*legitime manifestatus,*" which properly means, *manifested according to the requirements of the law,* or, in other words, *in the prescribed form.* As the form is more closely described in the next chapter, we may here take "legitimately manifested" in the sense of any appropriate manifestation, which according to common custom would be considered a marital consent.

The conditions of the consent may be explained as follows:

a) Since the consent must proceed from a deliberate act of the will, and the latter supposes the *intellect to be in a sound or normal condition,* it is evident that the parties must be able to perform a human act, that is to say, they must be in actual possession first and above all of the fac-

2 C. 5, C. 27, q. 2; cfr. cc. 1–6 *ib;* De Smet, *l. c.,* p. 72 f.

3 Cfr. the *dictum Gratiani* in C. 29, q. 1.

ulties of the mind. One not *compos sui,* or in a hypnotic state, or under the influence of narcotics cannot possibly perform a human act. An interesting case is that solved by the S. C. Concilii in a Strasbourg case, 1907. The bride had been in an insane asylum two years before the marriage, but had been discharged as apparently cured. On her wedding day she commenced to act queerly, and on the second day after the marriage she had to be sent back to the asylum. The marriage was declared invalid.[4] Here it may be well to note that the so-called incubation period preceding the outbreak of a disease has also to be considered. What are styled *lucida intervalla, i. e.,* moments of apparently normal consciousness, must be taken with a good grain of salt and not easily admitted.

b) The consent is given by the will, and must be *sincere, i. e.,* given without dissimulation, and *serious.* Concerning the latter quality, it may be safely said that the matrimonial consent is never presumed to be given jocosely, because no one in his senses can be supposed to joke in such an important matter. But it may happen that there is *simulation.* The following case was proposed to the Roman Court in 1883 and 1885.[5] James contracted marriage with Gemma before the civil and the ecclesiastical court of Paris. But he did not love Gemma, but Olga, with whom he maintained illicit intercourse before and after the marriage. The reason why he married Gemma was to obtain a dowry of $50,000. He went through the formalities of the wedding, but planned to get rid of Gemma. He administered poison to her in a summer resort, but Gemma, though suffering from the effects for more than six months, recovered and instituted

4 S. C. C., Nov. 23, 1907 (*Anal. Eccl.,* t. XV, 478 ff); July 7, 1883 (*A. S. S.,* t. 16, 262 ff).

5 Cfr. *A. S. S.,* t. 18, 14 ff.

proceedings in the ecclesiastical court. Her lawyer succeeded in having the marriage declared null on the plea that James had had no intention of contracting an indissoluble marriage, and therefore rejected the *bonum sacramenti*. Yet, since a feigned consent may not be presumed, but must be proved, the lawyer had to furnish proofs that James really intended no marriage with Gemma. Sanchez [6] offered the solution. This author, after having proved [7] that the matrimonial consent must implicitly be directed to, or at least not against, the indissolubility, says that only moral, not metaphysical, certitude is required to prove the fact of feigned consent. This certainty, not being defined by law, must be such as would satisfy a prudent man. Thus probable conjectures may produce moral certainty. The lawyer in our case proved from preceding, accompanying, and subsequent circumstances that James never intended to marry Gemma, but merely wanted her dowry. His love letters to and relations with Olga confirmed his intention to get rid of Gemma. Hence the feigned consent. The S. C. Concilii confirmed the sentence of the ecclesiastical court declaring the marriage to be invalid.

c) The consent of both parties must be *morally simultaneous*. It is not required that it be physically one. In any contract moral connection is sufficient, and the marital consent does not differ in this regard from other contracts, otherwise it would be impossible to employ a proctor. But a simultaneous act is required so that it becomes evident that the consent of one party endures and is not revoked at the time the consent of the other is given.

How much time may intervene between the consent

[6] *De Mat.*, l. II, disp. 45, § 4. [7] *Ibid.*, l. II, disp. 29, n. 11.

of the one and that of the other party cannot be precisely stated.[8] A proximate measure may be derived from the repetition of the banns after six months.[9]

The marital consent, unlike that required for certain civil contracts, *cannot be supplied by any human power,* — parents, or guardians, or magistrates, or by the Pope.[10] This follows from the very nature of marriage. For no one can claim power over a thing that depends on the free will of another, but by marriage the parties obtain power over each other's bodies, and this must be given by free and personal consent.[11]

2. This leads us to § 2, which determines the *physiological* and *physical object of the matrimonial consent.* The physical object is the body, or rather the right to the bodies of the contracting parties. This right is determined by the perpetual and exclusive union between both parties and by the primary end of marriage, which is the procreation of offspring. Note that the two properties and the end of marriage are mentioned together. Hence if both parties intended and expressed the intention in some way or other to enter upon a mere concubinage, there would be no marriage. But such an intention must be proved in the external forum. A proof would be if a custom existed, such as that in Victoria Nyanza, where men buy women like chattels, for the mere sake of concubinage, either for a definite or for an indefinite time.[12] In Turkish Armenia some men went to the Turkish magistrate apparently to contract a marriage, but in reality to have a concubinage sanctioned. It was decided that if both parties went to the officer with the

8 Sanchez, *l. c.,* l. II, disp. 32, admits a seven or two years' interval; see, however, our text.

9 Can. 1030, § 2.

10 Pius VI, July 11, 1789.

11 S. Thomas, *Suppl.,* III, q. 45, art. 1.

12 S. O., April 3, 1889, ad 2; Aug. 19, 1857, ad 5 (*Coll.,* nn. 1700, 1147).

same intention, namely to cover their concubinage, although they professed to contract marriage, no marriage resulted; but if only one party had that intention and lured the other into making such a contract by fraud or deceit, the marriage was valid *in foro externo,* and the guilty party must renew the consent, so as to supply his previous faulty intention.[13]

The question may arise, what sort of knowledge concerning the qualities and the end of marriage is required to make the contract valid? Obviously, the positive wish (*animus et voluntas*) to contract a dissoluble marriage amounts to a denial of the essential quality of permanency, and therefore, where such a wish and intention exist, no real marriage is contracted. But if only a vague notion of divorce existed in the mind, or the parties, though admitting polygamy or divorce, would intend to contract marriage without a positive and efficacious assertion of the right — as they claim — of divorce, the marriage would be valid.[14] Note that the question solely concerns the intellectual conviction of the contracting parties. How a condition properly so-called would affect the matrimonial consent, will be explained under can. 1086.

3. Can. 1082 is intimately related to § 2 of the preceding canon. It determines the mental condition of the contracting parties by saying that *they must at least be not ignorant of the permanent union between man and woman for the primary purpose of marriage.* This is cautious language, made necessary by the different views of individuals and the varying customs of countries. The indissolubility of the marriage bond does not flow from the primary natural law, which is the same in all and unchangeable,[15] but from the secondary natural law, which is

13 S. O., Aug. 19, 1857 (*l. c.*).
14 *Ibid.*
15 S. Thomas, I–II, q. 94, art 4 f.

a series of conclusions drawn from the primary law. Hence it is that the pristine ideal of marriage may be obscured in the minds of men, especially in half-civilized countries and in civilized countries which admit divorce. Education and social surroundings influence the judgment of men regarding marriage. The wording of the text is negative and merely excludes complete ignorance; hence it is not required that the contracting parties should realize the full extent of indissolubility or that they should be aware of all the details of conjugal life.

§ 2 of can. 1082 says that *ignorance may not be presumed after the age of fourteen in boys, or twelve in girls.* But though nature usually teaches them what marriage is after that age, yet if one of the parties would be found incapable of giving a real matrimonial consent because of a defective mind or lack of ordinary discretion, the marriage could not be judged valid; because in such matters truth, not presumption, is always obeyed.[16] A girl of twelve years and nine months was married to a man in the diocese of Ventimiglia. But though she had reached the age of puberty, she did not know what marriage meant and required, and hence the parish priest objected to the union. The Vicar-General, however, when informed of the facts, allowed the wedding and the pastor assisted. After eight months the man left for a protracted absence, and the girl married before the civil court. The case was brought to Rome and the S. C. Concilii decided against the validity of the marriage because, as it appears, the girl lacked the necessary discretion.[17]

But even after puberty is reached there may be *an er-*

16 Gonzalez, lib. IV decret., tit. 2, ad c. 2, n. 5.

17 S. C. C., June 13, 1885; May 19, 1888; Aug. 18, 1888 (*A. S. S.*, t. 21, 162 ff).

roneous opinion concerning the primary end of marriage, viz., the bringing forth of children. We mean strictly an erroneous opinion, not a condition formally agreed upon to avoid the purpose of marriage. Gemma married James, but refused to consummate the marriage, saying she would never have married, had she known of the *copula*. When the case was brought before the Roman Congregation, no direct answer was given, but a dispensation was granted *super matrimonio rato*.[18] This action is quite intelligible, for the girl was of age, normally developed in mind and body, and had not made any positive contrary agreement or act of the will before or at the marriage.

Finally we may add a word concerning the *civil ceremony* which in some countries is prescribed by law. How are Catholics to regard it? In itself the ceremony is not forbidden. But the Church can not accept the declaration made before a civil magistrate as the matrimonial consent which effects the marriage tie. Therefore a distinction must necessarily be made. If the matrimonial consent was lawfully given before *the civil ceremony* took place, the marriage is complete and the contracting parties are entitled to exercise the matrimonial rights. When they go before the civil magistrate to declare their consent, this declaration is merely a civil ceremony and adds nothing to the validity of the marriage already contracted.[19] But if the civil ceremony *precedes* the matrimonial consent to be lawfully given, Catholics are not allowed to have the intention of contracting marriage by the civil ceremony, nor can they validly give consent, no matter what the form prescribed. Consequently they

18 S. C. C., Dec. 18, 1869 (*A. S. S.*, t. 5, 652 ff).

19 Benedict XIV, "*Inter omnigenas*," Feb. 2, 1744, § 10; S. O., Oct. 1, 1785 (*Coll.*, n. 580).

are not married nor entitled to the exercise of conjugal rights until they are married before the Church.[20]

ERROR — SERVITUDE

CAN. 1083

§ 1. Error circa personam invalidum reddit matrimonium.

§ 2. Error circa qualitatem personae, etsi det causam contractui, matrimonium irritat tantum:

1.° Si error qualitatis redundet in errorem personae;

2.° Si persona libera matrimonium contrahat cum persona quam liberam putat, cum contra sit serva, servitute proprie dicta.

§ 1. Error concerning the person renders a marriage invalid.

§ 2. Error concerning the quality of the person, even if it is the cause of the contract, renders the marriage invalid only:

1.° When the error about the quality amounts to an error about the person;

2.° If a free person marries one whom he supposes to be free, but who in fact is a slave in the true sense of the word.

This canon contains what were formerly called the two impediments of error and servile condition. Error is here considered as exclusively concerning the contracting parties, not the sacrament of matrimony as such. The latter was dealt with partly in the preceding canon, and shall partly be dealt with under can. 1084.

1. *Error* is a state of mind in which one mistakes one thing or person for another,[21] as, for instance, when we

20 Benedict XIV, "*Redditae Nobis*," Sept. 17, 1746 (*Bull.*, Prati, 1, III, 462 f.).

21 C. 6, C. 22, q. 2; C. 29, q. 1.

think A is B or a crowbar is a poker. In the first-mentioned case we have what is called an *error about the person*. Now since marriage is effected by the consent of the contracting parties, and the will can desire nothing except what is proposed to it by the intellect, it is evident that such a mistake affects the very substance of the matrimonial consent.[22] Gratian sets forth the example of Lia and Rachel, but his solution is rather quaint.[23] He could have simply answered that an error about the substance of the contract nullifies the consent.[24] It would be an error about the person if James married Olga, when he intended to marry her sister Gemma. Such errors are rare, because it is seldom that two sisters resemble each other so closely that they can hardly be distinguished.[25] An error about the person may more easily happen where marriage is celebrated by proxy. Such a case happened in China, in 1906, and was solved by the S. Romana Rota in 1913. Wang, a widower, wished to marry again. His son Paul proposed to him a widow, Lu Cecilia, of good character and fair looks. But she had no desire to remarry. Whereupon Paul asked Sang Anastasia, an old and ugly wench, to marry his father. She was ready to comply. All this was done by a mediator, John Yu, who informed Paul of the substitution. But Paul never mentioned it to his father, and the marriage took place in church. When, after the wedding, Wang saw his wife for the first time, he was greatly disgusted. The S. R. Rota naturally decided against the validity of the marriage.[26]

22 C. 14, X, IV, 1; l. 8, Cod. I, 18: "*cum errantis voluntas nulla sit.*" fr. 57, Dig. 44, 7.

23 Gen. 29; C. 29, q. 1.

24 Boekhn, *l. c.*, IV, 1, n. 33.

25 Such an incident happened some years ago in Missouri; the bridegroom himself was puzzled.

26 S. R. R., April 16, 1913 (*A. Ap. S.*, V, 372 ff.).

2. Error about the *qualities of the other party* is of more frequent occurrence. However, here a distinction must be made. It may be that the quality concerning which one is in error *affects the person merely in an accidental way.* For instance, Joseph Buro, a citizen of Bruxelles, who went by the name of Buro de Chancartier, married a baroness of Leyden, by name of Theresa Kraus, a rich widow. She protested at the trial that she would never have married Buro had she known that he was not of the nobility. This was a purely accidental quality, and no error that reflected directly or indirectly on the person, and therefore the marriage was declared valid.[27] From this it may be seen that a mistake about an accidental quality (wealth, intelligence, domestic habits, peaceful disposition, health, even concealed pregnancy caused by another man, etc.) does not alter the substance of the marriage-object, which is the person itself.

But a quality may be substantially *equivalent to the person,* and form the sole and exclusive reason determining the other party to marriage. Bernardus Papiensis puts a case in the following terms. There comes a farmer's daughter, whom James does not know at all. She tells him: "I am Mathilda, the daughter of the king of Apulia; wilt thou take me for thy wife?" James smilingly answers: "I will," because he had heard of Mathilda, and is willing to marry her, but not the farmer's daughter. The marriage is invalid, because though James personally knew neither, the quality of royal rank moved him to marry the person who pretended to be Mathilda.[28] Another case: Peter marries Antonia, whom he believes to be the first-born daughter of Count N.

27 S. C. C., Aug. 7, 28, 1745 (Richter, *Trid.*, p. 244, n. 83). A similar case was decided similarly, because the quality was wealth; S. C. C., Aug. 9, 1817; May 27, 1820 (Richter, *l. c.*, n. 84).

28 *Summa,* ed. Laspeyres, p. 293.

He intends to marry the first-born daughter of Count N., believing that Antonia, here and now present, is that daughter. In the first case the marriage is valid, in the second case it is invalid, because the consent of Peter is directly and exclusively directed to the first-born daughter of the count.[29] This case can, practically speaking, occur only when marriage is contracted by proxy.[30] The error must be strictly proved, otherwise, on account of the *favor iuris* (can. 1014), the marriage would be reasonably held to be valid.

3. *Error as to the servile condition of the other party.* If a person who is free, contracts a marriage with one who is a slave, not knowing that he or she is a slave, this error or misapprehension annuls the marriage. If the servile condition of the one party was known to the other, there was no error or mistake, and the marriage was valid.[31]

But the Code says: *servitute proprie dicta,* slavery properly so-called. This, according to Roman law,[32] exists when one person is subjected, against nature, to the ownership of another, either by fact or birth. The slaves were called *mancipia* when regarded as a piece of property; *venales* when regarded as a saleable commodity; *famuli* when regarded as domestics; *servi* when regarded as bound to obey the commands of the master. These words in ordinary language were interchangeable and employed without distinction. From this strict notion must be distinguished another, that of *adscriptii,* who belonged to a certain property or estate and could be sold only with the land.[33] The Church, as is well known, mitigated

29 Clericatus, *Decisiones de Mat.,* ed. Venet., 1725, decis. 19, n. 30.

30 Cfr. Wernz, IV, Vol. 2, p. 14, n. 223.

31 Cfr. c. 4, C. 29, q. 2; cc. 2, 4, X, IV, 9; Smith, *Marriage Process,* p. 70.

32 Cfr. Ramsay-Lanciani, *Manual of Roman Antiquities,* 1901, p. 124; § 2, *Inst.,* I, 3.

33 Maschat, *Praecursus Juris Canonici,* 1760, p. 15.

the condition of slaves and admitted them to a true and legitimate marriage, but retained the impediment of servile condition in the form stated above. Though it has vanished in civilized countries, slavery still exists in Africa.[34] Since servile condition is not an impediment except when it is the subject of an error, no dispensation from it can be granted, but the error must be removed and the matrimonial consent renewed, unless the circumstances of the case call for a *sanatio in radice.*

ERROR AS TO THE NATURE OF MARRIAGE

CAN. 1084

Simplex error circa matrimonii unitatem vel indissolubilitatem aut sacramentalem dignitatem, etsi det causam contractui, non vitiat consensum matrimonialem.

A simple error as to the unity, indissolubility, or sacramental character of marriage, even if it be the cause of the contract, does not vitiate the matrimonial consent.

A *simple error* is one that proceeds merely from intellectual apprehension, and has no formal condition or stipulation attached to it, nor a formal act of the will excluding a substantial feature of marriage (can. 1086, § 2). The Code emphasizes this by adding: "*etsi det causam contractui.*" This signifies that the parties had the intention of contracting a union not in conformity with the notion of Christian marriage. However, in that case, especially if the parties had the intention of entering upon a concubinage, a distinction is necessary. If *both* parties had this intention and expressed it to each other, even though there were no mutual agreement,

34 Cfr. S. O., June 20, 1886 (*Coll.*, n. 1293, Vol. I, p. 721 f.).

the marriage would be invalid, for their intention was directed towards a mere concubinage. On the other hand, if the intention is occult and entertained only by one party, though the marriage may be judged invalid *in foro interno*, yet *in foro externo* the judgment would favor validity.[35] Such an intention depends largely upon the customs and views of the people or race to which the couple belongs. Therefore the decisions of the Holy Office take into consideration a twofold class of contracting parties: infidels and Christians. Concerning the marriages of *infidels*, missionaries are seriously exhorted not to draw the conclusion: "*In dubio standum esse pro invaliditate matrimonii*," because this would be contrary to the general principle that marriage enjoys the favor of the law. *Each single case must be examined and judged on its own merits.* Hence the first question is, whether a marriage was actually contracted, and the second, whether this marriage possesses the essentials of a marriage. Thus, if a woman would in good faith think herself to be the wife of a certain husband, and the husband would say nothing against that assumption, and the neighbors would not take scandal at their cohabitation, these would be signs of a real marriage by name and possession, and in such a case, though a doubt might still exist, the parties should be left in good faith, and if they wish to receive the sacraments, especially Baptism, they should not be repelled.[36] Missionaries should never fail to examine past marriages, nor are they allowed to keep silence about them, for although good faith may excuse the parties from sin, yet it can never make an invalid marriage valid. Still the mere opinion that marriage was dissoluble, even if combined with the intention to obtain a divorce in case

35 S. C. P. F., Oct. 1, 1785 (*Coll.*, n. 580).

36 S. O., Dec. 18, 1872 (*Coll.*, n. 1302).

of adultery or for other reasons, would not render a marriage thus contracted invalid.[37] If a marriage is found invalid, as, for instance, among the Gallas, where slaves contract a *contubernium* or legalized concubinage, the parties must be separated until they are lawfully married. Neither are they, after Baptism, to be left in good faith concerning the dissolubility of marriage. On the contrary, they may not even be baptized until they have been instructed on the nature of Christian marriage.[38]

As to the *marriages of validly baptized persons or those whose Baptism is dubious,* the following rule must be observed. In case of error concerning the properties of marriage, if it is simple and without implicit or explicit conditions, the marriage is always presumed to be valid, because the general will of contracting marriage according to the law of Christ prevails over the individual or particular will, which is, therefore, as it were absorbed by the general will.[39]

But how may the matrimonial consent co-exist with a serious error concerning the substance of marriage, especially indissolubility, or the *bonum sacramenti?* The parties wish to contract a true marriage, as instituted by God, and do not, by a positive act of the will, exclude the essential quality of marriage, although they would exclude it if they thought of it.[40] Therefore Anna, who marries Paul under the impression that she can obtain a divorce from him in case the marriage proves unhappy, contracts validly. The thought of a possible divorce only made her more ready to give her consent, but the consent itself did not depend on this reason or expedient,

37 S. O., March 11, 1868; Feb. 4, 1891 (*Coll.*, nn. 1327, 1746).

38 S. O., June 20, 1866, ad 25 (*Coll.*, n. 1293, Vol. I, p. 722).

39 S. O., Jan. 24, 1877 (*Coll.*, n. 1465); Benedict XIV, *De Syn. Dioec.*, XIII, 22, 7.

40 C. 7, X, IV, 19; Gasparri, *l. c.*, n. 903 f.

although it may have greatly influenced the same.[41]

The object of the simple error mentioned in our canon is either the unity, or the indissolubility, or the sacramental character of marriage. The former two may more readily exist in unbelievers, but they also exist in countries which admit divorce. The Greek schismatics and most Protestant sects, especially the Calvinists, have little scruple in permitting divorce. The sacramental dignity of marriage was denied by Luther and his followers, who looked upon marriage as a "purely worldly thing." Now no matter which of these three objects the error may concern, as long as it is a merely speculative or even practical error which causes one to give the matrimonial consent, it does not annul the marriage.

Can. 1085

Scientia aut opinio nullitatis matrimonii consensum matrimonialem necessario non excludit.

The knowledge or belief that the marriage will be void does not necessarily exclude matrimonial consent.

The source quoted in favor of this text is an instruction of the S. C. of the Propaganda, dated Oct. 1, 1785.[42] Some Armenians, as it appears of the Uniat Church, presented themselves before the Turkish magistrates with the firm purpose of taking a wife, not a concubine. However they thought that they could not contract a valid marriage, although if they knew of the sufficiency of the

41 This is the well known case of Paul Boni de Castellane and Anna Gould, which was three times proposed to the *S. Rom. Rota,* in 1911, 1913, and 1915 (*A. Ap. S.,* IV, 146 ff., V, 312 ff., Vol. 292 ff.). The first and third decisions were in favor of validity, the second was in favor of nullity, which we could not understand, because the so-called new proofs merely affected insignificant details.— Cfr. *Irish Eccl. Record,* 1918, Vol. XII, pp. 279 ff.

42 *Coll.,* n. 580.

civil act for contracting marriage, they would doubtless intend to contract marriage. But their error does not render the marriage invalid, because their presenting themselves before the civil officer is a mere formality and does not offset or annul the act of the will previously made. For when the error is concomitant only, and has no influence upon the substance of the act, but affects only an accidental quality, the contract remains valid. Thus also if a party thinks or implicitly believes that he is concluding a dissoluble union, without having a clear notion of the indissoluble character, the marriage is valid.[43] This appears to refer to the so-called *intentio interpretativa*. For the party would rather be inclined to contract a dissoluble marriage, yet, because the mind is not sufficiently formed or informed, it must be supposed that the natural property of marriage is to prevail over a certain *velleitas* or obscurely conceived notion. In other words, the presumption of the law interprets the intention in favor of validity.

INTERNAL AND EXTERNAL CONSENT

Can. 1086

§ 1. Internus animi consensus semper praesumitur conformis verbis vel signis in celebrando matrimonio adhibitis.

§ 2. At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum, aut omne ius ad coniugalem actum, vel essentialem aliquam matrimonii proprietatem, invalide contrahit.

§ 1. *The internal consent of the will is always presumed to correspond to the words or signs used in the*

43 S. C. P. F., Aug. 23, 1852 (*Coll.*, n. 1079).

celebration of marriage. Why? Because no one is supposed to joke or to simulate consent in such a serious and important matter. Hence though one of the parties may deceive the other by directing his or her intention to something else than marriage, yet if he or she expresses his or her consent in the customary and formally valid mode, the marriage is presumed to be valid *in foro externo,* although it may be invalid in the court of conscience.[44] This is true even if one had postulated a condition in his mind. For instance, James says to himself: "I will marry her if she is pregnant, because I want to repair the wrong I have done her." If James makes no condition when expressing his matrimonial consent before the qualified witnesses and has not made any formal stipulation with her before marriage, the latter is valid.[45] For the words express precisely what they intend to convey, namely, the matrimonial consent. The same must be said concerning *equivalent signs,* for instance, nodding.[46]

§ 2 states that if one or both parties, by a *positive act of the will,* would exclude marriage itself or the right to the conjugal act, or an essential property of marriage, *the contract would be null.*

Here there is no mere error or opinion, but a positive act of the will. What is meant by the term "*positivo voluntatis actu*"? A positive act of the will is not a mere error, either about marriage itself or about the person of the other party; nor is it the so-called *conditio apposita,* an express condition. Hence a positive act of the will must lie somewhere between these two. Note that the external

44 S. C. P. F., Oct. 1, 1785 (*Coll.,* n. 580).

45 S. C. C., June 23, 1907 (*Anal. Eccl.,* t. 15, 239 ff.).

46 S. O., Aug. 22, 1860 (*Coll.,* n. 1201): "*Matrimonium firmum ac validum consistere quoties nutus, vel caeremoniae coram testibus praestitae, iuxta communem regionis existimationem, mutuum sponsorum de praesenti consensum sufficienter exprimunt*"; cfr. S. C. P. F., Feb. 4, 1664; April 17, 1820 (*Coll.,* nn. 156, 2262).

consent, if given in the usual way, is presumed to correspond to the internal state of mind. This enables us to understand the term. A positive act of the will is an *express declaration* that one wishes to contract marriage in a manner which contradicts its very essence, object, or essential properties. Hence, like a positive law, this act of the will must be formulated and externalized or made known by means of a certain formula.[47] That no merely internal act can be intended, appears clearly from a consideration of § 1 of this canon. Besides, a merely internal act could never render a marriage invalid *in foro externo*. Direct proof that an external act is intended may be gathered from an instruction of the Holy Office.[48] After having stated that the individual will is absorbed by the general will of Christ, who raised Matrimony to a higher sphere and restored its original idea, the S. Congregation says: "But this absorption cannot take place if a formula is employed which contains an explicit or implicit condition against the perpetuity of marriage." It then sets forth certain Calvinistic tricks which were calculated to convince the contracting parties, at the very wedding, that they were entering upon a union which did not correspond to the command of Christ. Thus they abused Matt. 19, 9; 5, 32 and Heb. 13, 4 to insinuate the dissolubility of marriage.

Of course it is not required that this positive act of the will be declared to the other party; but it must somehow be manifested outwardly. A case solved by Innocent III plainly indicates that one party may deceive the other for the purpose of the *copula*. But this case also proves

47 S. O., July 22, 1840, ed. 2 (*Coll.*, n. 903): "*Matrimonium mixtum esse nullum, sc. parte acatholica expresse declarante se contrahere matrimonium de praesenti iuxta formulam perpetuitati matrimonii contrariam.*"

48 S. O., April 6, 1843 (*Coll.*, n. 965).

that although theoretically speaking there may be no doubt as to the invalidity of a marriage contracted with the positive will not to contract marriage, yet practically speaking, or as a matter of fact, it would be hard to prove, unless circumstantial evidence could be offered to that effect.[49] A corroboration of this view is found in the answer given to the bishop of Sioux Falls concerning the marriages of Indians. He had asked whether they might be trusted if they declared under oath that they never intended to contract an indissoluble union. Yes, said the Holy Office, if each case has been duly examined as to the credibility and truthfulness of the parties concerned.[50]

The positive act of the will may exclude *marriage itself*. If one would contract a union merely for the sake of carnal gratification, it would be no marriage. Or if two persons would marry purely for friendship or for literary co-operation,[51] there would be no marriage.

Or *the positive act of the will may exclude all right to the conjugal act, i. e., ius ad copulam,* and thus deny radically the primary end of marriage. Different from the right is the *exercise* thereof. This is not essentially required for the validity of the marital contract and may therefore be omitted.[52] Hence the purpose of "avoiding offspring" would not *per se* exclude marriage.

49 C. 26, X, IV, 1, where the pope distinguishes between the fact and *quid iuris sit,* the latter being evident if no consent was given.

50 S. O., May 19, 1892; May 25, 1898 (*Coll.,* n. 1796; Vol. II, p. 367): "*Ut Indianus probet legitime se habuisse in contrahendo explicitam voluntatem repudii in causa adulterii, exterius manifestatam.*"

51 S. C. C., Aug. 6, 1881.

52 Cfr. cc. 26, 31, X, IV, 1; c. 5, X, IV, 4; *A. S. S.,* V, p. 553 f. If we say that the *exercise of the marital act is not essential to the marriage contract* it should not be construed as if we would contradict our own statements concerning impotency and vows (cfr. can. 1092). For where there is not even a radical foundation for that right existing and admitted, as in the case of impotency and vow, no right can be foregone, inasmuch as every right supposes the possession or holding of something to which a claim may he made.

Lastly the *positive act of the will may exclude the indissolubility and unity of marriage.* Indissolubility excludes the positive will to contract marriage with the right to divorce.[53] Unity excludes polygamy. Opposed to this essential property of marriage would be the positive will to deliver the wife, or (if the woman would make the resolution) to deliver herself, to prostitution or adultery for lucre's sake.[54]

VIOLENCE AND FEAR (VIS ET METUS)

CAN. 1087

§ 1. Invalidum quoque est matrimonium initum ob vim vel metum gravem ab extrinseco et iniuste incussum, a quo ut quis se liberet, eligere cogatur matrimonium.

§ 2. Nullus alius metus, etiamsi det causam contractui, matrimonii nullitatem secumfert.

§ 1. Marriage is invalid also when it is entered into because of violence or grave fear, caused by an external agent, unjustly, to free himself from which one is compelled to choose marriage.

§ 2. No other fear, even though it would give cause to the contract, entails the nullity of marriage.

This is the so-called impediment of violence or fear, which was and still is, and must by its very nature be, of a rather fluctuating character. The Roman law, which permitted divorce,[55] looked upon marriage contracted under compulsion or fear as a contestable matter only. The Penitential books connect it with rape.[56] Gratian's De-

53 S. O., May 18, 1898 (*Coll.*, n. 1999).

54 C. 7, X, IV, 5.

55 Fr. 22, Dig. 23, 2.

56 Wasserschleben, *l. c.*, pp. 150, 170, 216, 410, 510, 641.

cree [57] and the Decretals [58] mention it in a rather cursory way in connection with the paternal power and the espousals of *impuberes*. Freedom is strongly insisted upon in the authentic collections. But it would be difficult to find a positive text to prove that *vis et metus* were introduced either by custom or by written law as an impediment, or that the Roman tribunals ever cited such a positive law when they declared a marriage invalid.[59] Therefore it is safe to say, with the Holy Office,[60] that the impediment of violence and fear is based on the natural law, and that consequently a dispensation proper cannot and is not granted by the Church in such cases. This view is corroborated by the Code, which places violence and fear not among the impediments proper, but among the natural obstacles besetting the matrimonial consent.

1. Violence is the onset of an outward superior force too great to be repelled (*"vis est majoris rei impetus qui repelli non potest"*).[61] It may also be defined as physical coercion or constraint, which compels one to do something against one's will. In the matter of marriage compulsion signifies a violent act by which one is forced into giving one's consent, for instance, by the use of arms, or haling the other party before the minister or officer. However, it is evident, as S. Thomas says,[62] that violence cannot be done to the will as far as the proper act of that faculty is concerned, because this act proceeds from an interior principle, whilst violence comes from without. But it is also true, as the same holy Doctor says, that violence is directly opposed to the *voluntarium*, is against the very nature of free-will, and therefore causes the ac-

57 Cfr. cc. 1, 3, 4, C. 31, q. 2.

58 Cfr. X, IV, 1; c. 9, X, IV, 2; X, I, 40.

59 Wernz, *l. c.*, IV, Vol. 2, p. 52 f., n. 266.

60 S. O., Feb. 15, 1891 (*Coll.*, n. 2101).

61 L. 1, § ult., Dig. 4, 2.

62 *Summa Theol.*, I–II, q. 6, art. 4 f.

tion of the will to be involuntary. Hence, marital consent given under such constraint would be of no account.

2. Violence causes *fear,* and is therefore related to fear as cause to effect. Fear is "a perturbation of the mind on account of an impending evil." [63] There must be a connecting link between the object of fear, or the evil threatened, and fear itself, otherwise fear could not influence the will to do one thing rather than another. In other words, fear must determine the will to perform a certain act exactly and precisely on account of the evil impending. And here it must be noted that fear does not render the act elicited or commanded or performed under its influence purely involuntary, but only under a certain aspect, *viz.,* with regard to the evil threatened.[64] However, observe that right reason would rather consider the repugnance of the will as affected by fear in a matter of such weight and with such enduring consequences as are attached to marriage. The Roman law, admitting divorce, had smooth sailing; but the Church, which rejects the dissolution of the marital tie, naturally attached more influence to fear than the Roman State. In course of time she became the sole champion of perfect liberty in matrimonial matters. The psychological element prevailed over the metaphysical of fear.

3. Fear may differ as to cause, mode and degree.

a) The *cause of fear* may come from within or from without. It comes from within when it is occasioned by a natural event, the existence of which is not dependent on a free or human agent, for instance, an earthquake,[65] a shipwreck, a fire. From without (*ab extrinseco*) fear

63 Dig., *l. c.;* Tancred., *l. c.,* p. 46.

64 Cfr. *Summa cit.,* art. 6.

65 We still remember the earthquake of Jan. 13, 1915, which caused a panic in the "Holy City" of Rome for several days.

may be caused by a free agent, *i. e.*, man, who has it in his power to inflict it.

b) Hence the *mode* or manner of fear may be just or unjust. Fear is *unjust* when it is inflicted by one who has no authority or right to threaten the evil involved, or when it is threatened for no adequate reason, or for a reason not connected with the evil threatened. Fear is just if caused by lawful authority or by one who is entitled to make the threat, or when there is solid reason for it.

c) In *degree* fear is either grave or slight.[66] Grave fear may be absolutely or relatively grave. *Absolutely grave fear* is such as would frighten or intimidate any firm and prudent man or woman (*cadens in virum constantem*). *Relatively grave fear* is one which may affect or move to action some men or women, whilst it will not affect others. As the natural, physical and mental conditions of individuals differ, it is difficult to establish a general rule. *Slight fear* arises either from a light evil threatened, or from a grave evil which may be easily averted. Finally mention may be made of what is called *reverential fear,* which causes one to be afraid to offend his parents or superiors. This again is liable to various degrees according to education, psychological impressions, and other circumstances.

d) *The Code most reasonably refers this kind of fear to marriage.* Hence there must be a choice between marriage and the threatened evil that causes fear.[67] This is quite evident, for if marriage is not the evil threatened under the influence of fear, how could fear affect mar-

66 Cfr. Tancred., *l. c.*, p. 47.

67 Hence the so-called *opinio probabilior* of Schmalzgrueber (IV, 1, n. 398) referred to by Smith (*Marriage Process,* p. 84), that no connection between marriage and the evil is required, is now destitute of probability, as it was in fact *a priori.*

riage, or how could it influence the will to choose that expedient?

The following propositions, taken from authentic sources, will illustrate the text of the Code.

1. *Proposition: Physical compulsion* brought to bear upon a party in order to extort the matrimonial consent, *simply annuls the marriage,* because no free consent is possible where there is physical constraint.[68]

2. *Proposition: Absolutely or relatively grave fear,* threatened *from without* for the purpose of eliciting the matrimonial consent, *annuls a marriage* if the mode or manner in which it was inflicted was *unjust,* or if there was no adequate reason for threatening the marriage. Thus if one is threatened with the galleys or marriage, he would be influenced by grave fear, but though the mode was just, because inflicted by the judge, it was unjust, because the *stuprum* imputed was only proved by rumor.[69] The detention of a woman in a fortress by force would annul a marriage.[70] If one is threatened with imprisonment or marriage, and chooses the latter, the marriage is invalid. The instigators of that imprisonment were the parents of the girl, who declared that N. had done her violence, but after the forced marriage with N. she confessed that another one had committed the crime.[71] A case of fear threatened from without, but with a mixture of intrinsic fear, was solved in favor of nullity.[72] In other cases the S. Congregation has decided in favor of validity, if the fear was caused merely by empty threats

68 C. 14, X, IV, 1; Bernard. Pap., *l. c.,* pp. 303, 347.

69 S. C. C., March 26, 1707 (Richter, *Trid.,* p. 238, n. 71).

70 S. C. C., Aug. 19, 1724; June 9, 1725 (Richter, *l. c.,* n. 74).

71 S. C. C., March 18, 1731; May 4, 1746 (Richter, *l. c.,* nn. 76, 79).

72 S. C. C., July 13, Sept. 22, 1725 (Richter, *l. c.,* 82). A grave fear may be inflicted by the refusal of the Sacraments; cfr. S. R. R., May 10, 1918 (*A. Ap. S.,* XI, 89 ff.); but the case is allied to rape.

and admonitions, and was threatened not precisely with regard to marriage, but only to repair the honor and good name of the girl.[73] Thus it may happen, as we know from a case brought to our knowledge, that a man is forced by the brother of a girl with pistol in hand to marry her. Whether this happens on the same day or on the day before the marriage is immaterial, provided there be danger of life. But if the party thus threatened can escape by leaving the country or his home, the fear would cease, though, of course, the revengeful brother might follow him, and therefore the only real escape would be the marriage, which in that case we would not hesitate to declare invalid. Some authors[74] extend the case thus: Even if the evil threatened in connection with the marriage would affect near relatives, the fear would be sufficient to annul the marriage. Assuming, for instance, that the brother or first cousin of James is threatened,—if James would volunteer to marry the girl in order to save his brother or first cousin, he would be acting under grave fear, which would affect the validity of the marriage. The Code is not opposed to this view.[75]

3. *Proposition: Fear threatened solely from within* cannot annul a marriage because a necessary or blind cause cannot influence the will *ad hoc, i. e.,* with regard to marriage.[76]

4. *Proposition: Slight fear (metus levis) does not annul marriage* because it cannot efficaciously move the will and diminish the voluntariness of an act. Besides, if

73 S. C. C., Sept. 1, 1725; June 18, 1735; April 24, 1700; April 23, 1701 (Richter, *l. c.*, nn. 75, 77).

74 Schulte, *Eherecht,* p. 128, would include only relatives of the first and second degree, whilst v. Scherer, II, 176, extended it to more remote ones.

75 For it does not limit that fear to the person himself, and on the other hand it is perfectly true that a man with natural affection considers evil or good befalling his dear ones as affecting himself.

76 Sanchez, *l. c.*, l. IV, disp. 12, n. 3.

slight fear would induce nullity, the appeals for annulment would become innumerable and the indissolubility of marriage a farce.[77]

5. *Proposition: Reverential fear (metus reverentialis)*, as long as it remains such and is not accompanied by serious threats, for instance, of disinheriting, or by blows, spoliation of ornaments (earrings, jewelry) *cannot annul marriage.* But if means such as those just enumerated are used to enhance the fear, it might suffice to annul marriage, especially in the case of children of a naturally timid and affectionate disposition.[78]

The right to attack a marriage on the ground of violence and fear is restricted to the parties who suffered violence or fear; outsiders are excluded from the duty and the right of making an accusation on this score.[79]

Lastly it should be noted that a marriage contracted under the influence of grave fear cannot be revalidated by mere cohabitation or by the *copula etiam cum affectu maritali habita,*[80] but the party who suffered fear must renew the consent according to can. 1136.

MODE OF EXPRESSING THE CONSENT

CAN. 1088

§ 1. Ad matrimonium valide contrahendum necesse est ut contrahentes sint praesentes sive per se ipsi sive per procuratorem.

§ 2. Sponsi matrimonialem consensum exprimant

77 Sanchez, *l. c.*, IV, disp. 17, and Gasparri, n. 945, maintain that the ecclesiastical law rejects *metus levis,* but Wernz (IV, Vol. 2, p. 47, n. 263) justly observes that these authors could not allege a single text for their opinion, and therefore the *natura ipsius metus levis* is sufficient.

78 S. C. C., June 8, 1720; July 17, 1745 (Richter, *l. c.*, nn. 72, 78); S. Rom. Rota, July 7, 1911; June 2, 1911 (*A. Ap. S.*, III, 661; IV, 108).

79 Instructio S. C. P. F., 1883, n. 36 (*Coll.*, 1587).

80 S. C. C., June 20, 1609; Dec. 2, 1634 (Richter, *l. c.*, n. 82).

verbis; nec aequipollentia signa adhibere ipsis licet, si loqui possint.

To contract a valid marriage the parties must be present either personally or by proxy; they must express the matrimonial consent by words, and are not allowed to use equivalent signs when they are able to speak.

Christian marriage being a sacrament administered by the contracting parties, it follows that the latter must manifest their consent in the *presence of each other* in such a way and at such a distance that the act can be perceived by the senses. § 2 expressly requires the use of *words*, because these are the usual means of human communication. Equivalent signs, for instance, nodding of the head,[81] or putting the ring on the finger are allowed only when one or both of the contracting parties are incapable of speech. However, the use of words does not affect the validity of the consent.[82]

MARRIAGE BY PROXY

Can. 1089

§ 1. Firmis dioecesanis statutis desuper additis, ut matrimonium per procuratorem valide ineatur, requiritur mandatum speciale ad contrahendum cum certa persona, subscriptum a mandante et vel a parocho aut Ordinario loci in quo mandatum fit, vel a sacerdote ab alterutro delegato, vel a duobus saltem testibus.

§ 2. Si mandans scribere nesciat, id in ipso mandato adnotetur et alius testis addatur qui scripturam ipse quoque subsignet; secus mandatum irritum est.

81 Cfr. S. O., Aug. 22, 1860 (*Coll.*, n. 1201).

82 Cfr. cc. 23, 25, 31, X, IV, 1; *Rituale Rom.*, tit. VII, c. 2 (ed. Pustet, 1913, p. 213 f.); S. O., Aug. 22, 1860; S. C. P. F., Feb. 4, 1664; April 17, 1820 (*Coll.*, nn. 1201, 156, 2262).

§ 3. Si, antequam procurator nomine mandantis contraxerit, hic mandatum revocaverit aut in amentiam inciderit, invalidum est matrimonium, licet sive procurator sive alia pars contrahens haec ignoraverint.

§ 4. Ut matrimonium validum sit, procurator debet munere suo per se ipse fungi.

The preceding canon simply stated that marriage may be contracted by proxy. Therefore, since the Council of Trent,[83] and now after the promulgation of the Code, marriage by proxy is lawful and valid.[84] This canon prescribes the *modus facti,* or what is required in order that a marriage by proxy be valid. After having referred to the diocesan statutes, which may require further conditions, the Code says:

1) A *special mandate* is needed to contract marriage by proxy with a *specified person.* This mandate must be in writing, must be signed by the principal and either by the pastor or the Ordinary of the place in which the mandate is given, or by a priest delegated by either the pastor or the Ordinary, or by two witnesses.

This is nothing else but an application of can. 1094, for the proxy takes the place of one party. Of course, if both would choose a proxy — which is not likely to happen — the same process would have to be applied to both proxies, and each must have a mandate signed by the principal, the respective pastor, etc.

2) If the person issuing the mandate (*mandans*) is *unable to write,* this fact is to be noted in the mandate and an additional witness must sign the document, else it is void.

3) If the *principal has revoked his mandate or become*

83 Sess. 24, c. 1, *de ref. mat.*
84 Benedict XIV, *De Syn. Dioec.,* XIII, 2, 9.

insane before the proxy makes the contract, the marriage is invalid, even though both the proxy and the party with whom the contract was made would be unaware of the change.[85] For the consent is suspended by that incident, and does not last in the mind of the *mandans.*

4) The proxy must execute his mandate personally, not by a delegate, else the marriage will be invalid. The reason for this condition is that generally in such a matter personal qualities determine the choice. Of course, it is supposed that the proxy, when contracting marriage in the name of the *mandans,* is in a normal condition of mind and body, and especially that he is able to realize what is going on.[86]

Can. 1090

Matrimonium per interpretem quoque contrahi potest.

Marriage can be contracted also through an interpreter.

In this case, which differs from proxy, because the parties are supposed to be present, the interpreter must faithfully translate the consent of both.

Can. 1091

Matrimonio per procuratorem vel per interpretem contrahendo parochus ne assistat, nisi adsit iusta causa et de authenticitate mandati vel de interpretis fide du-

85 C. 9, 60, I, 19; S. C. C., July 5, 1727 (Richter, *Trid.*, p. 238, n. 69). Insanity need not be perpetual, but may be temporary, no matter what Sanchez (l. II, disp. 11, n. 12) says against other authors. The case in *Anal. Eccl.*, 1901, p. 430, offered a wrong solution.

86 The case mentioned in the preceding note depicted the proxy as acting under strong, though not overpowering, influence of alcohol; on that score he had contracted validly; but because the *mandans* had fallen into insanity at the time of the marriage contract, the latter was invalid.

bitari nullo modo liceat, habita, si tempus suppetat, Ordinarii licentia.

The pastor shall not assist at a marriage which is to be contracted by proxy or by interpreter, unless there be a just cause for it, and no doubt exists concerning the genuineness of the mandate or the trustworthiness of the interpreter; if time permits, the Ordinary's permission should be obtained.

There would be room for doubt if the mandate were not sealed with the parochial or diocesan seal. If properly signed and sealed the document cannot be rejected. A legitimate cause justifying the pastor in assisting at such a marriage would be absence from home, or perhaps unsafe conditions arising from feudal or family dissensions, etc.

CONDITIONAL MARRIAGE

CAN. 1092

Conditio semel apposita et non revocata:

1.° Si sit de futuro necessaria vel impossibilis vel turpis, sed non contra matrimonii substantiam, pro non adiecta habeatur;

2.° Si de futuro contra matrimonii substantiam, illud reddit invalidum;

3.° Si de futuro licita, valorem matrimonii suspendit;

4.° Si de praeterito vel de praesenti, matrimonium erit validum vel non, prout id quod conditioni subest, exsistit vel non.

There are certain rare historical documents[87] which could be alleged as proving the existence of this former

87 Freisen, *l. c.*, p. 232 ff. Wernz, *l. c.*, IV, p. 433 (ed. 1) endeavors vainly to show a historical coherence.

impediment. With the exception of two "Paleae"[88] in the Decree, Master Gratian seems to ignore it. Bernardus Papiensis is the first writer who mentions it *ex professo*.[89] The Decretals[90] deal with conditional marriage under a special title, but the Code no longer treats condition as an impediment.

A condition or stipulation is a quality added to a contract which suspends its validity or effect until the time when the condition is fulfilled. From this definition it may be seen that a condition almost invariably concerns the *future*. A condition referring to the past is not a condition in the proper sense of the term.

Stipulations may regard the *substance of marriage*, especially its indissolubility, loyalty, and primary end. They may not be repugnant to the substance of marriage, and yet be *sinful*, because of the unlawfulness of the object aimed at. They may also be *impossible* of fulfillment. This impossibility may spring from human incapability of fulfilling the stipulation, because the object is beyond man's power. A *necessary* condition is one, of which the fulfillment depends on natural, not free, causes (*eventus fortuitus*). The text proceeds according to the various conditions.

1. When a *condition has been placed to the consent and not withdrawn, if it concerns the future and is necessary or impossible or dishonest,* but not contrary to the substance of marriage, it *must be regarded as non-existing.*

a) A *necessary* condition would be, for instance: "If the sun rises to-morrow," "If your mother dies," or "If I

88 Cfr. cc. 7, 8, C. 27, q. 2; which are spurious; cfr. Berardi, *Canones Gratiani Genuini*, I, 172.

89 *Summa Decret.*, ed. Laspeyres, IV, 5, p. 146 f.

90 Cfr. X, IV, 5.

get a good crop," for such conditions depend on circumstances over which man has no control.

b) An *impossible* condition would be: "If you will touch the sky with your fingers," [91] or "If you will not get sick," or "If you will live forever."

c) A *sinful* condition would be: "If you will embrace a non-Catholic creed," or "If you will kill your mother-in-law," or any other stipulation which involves a sin.

Now all such conditions are to be considered as non-existing, and therefore, as the canonists [92] say, they vitiate or kill themselves, not the matrimonial contract. A sensible and honest person is not supposed to contract marriage under frivolous conditions. The Church clearly wishes to safeguard the importance and seriousness of marriage by this law.

2. If the *condition concerns the future* and is *against the substance of marriage, it renders the marriage invalid.* The school [93] expressed this truth thus: A condition that is against the substance of marriage, vitiates the latter, but not the condition itself. For in every such case there are two positive acts of the will, one contrary to the other, inasmuch as the contracting party on the one side wills the marriage, because the will is bent on the marriage contract, while, on the other side, the will does not will, because it excludes or restricts the obligation and hence the right.[94] Note that we speak of a condition, which must proceed from a deliberate act of the will, and not from mere apprehension or interpretation, as when one would say: If I had known this, I should not have contracted marriage. This would be a case of error or

91 Bernard. Pap., *l. c.;* c. 7, X, IV, 5.

92 Fagnani, *Comment.*, c. 1, X, 5, nn. 2 ff.

93 Fagnani, *l. c.*, n. c. 7, nn. 2 f.

94 Gasparri, *l. c.*, n. 919 (Vol. 2, p. 41).

misunderstanding, but there would be no formal act of the will. Besides being a condition or stipulation, it must be mutually, externally, and lastingly agreed upon (*in pactum deducta*).[95] We say *lastingly,* because the stipulation must not be retracted before the marriage consent is given. But it is not necessary that this stipulation be repeated at the wedding, and hence the parties may give their consent absolutely like other contracting parties who marry unconditionally. This point was insisted on in a certain cause brought before the S. C. Concilii.[96] However, the document drawn up before the marriage and the fact that the pastor would not, at first, assist at the marriage for the very reason that a condition against the substance of matrimony had been attached, proved clearly the existence of a mutual stipulation. Therefore the marriage was declared invalid.

The substance of marriage is embraced in the threefold good thereof: the *bonum sacramenti, fidelitatis et prolis.*

a) Opposed to the *sacrament* is solubility by which a person could marry for a certain time only, or as long as it pleased his partner. Charles and Caroline were married April 12, 1887, but he soon grew tired of living with the same woman, and after fifteen days Caroline had to return to her home. The episcopal court returned a verdict in favor of nullity because "of the evidently implied condition of contracting a soluble marriage." But the S. C. Concilii upset this sentence and pronounced in favor of validity, because there were no proofs for the existence of any such stipulation.[97] If a Catholic would

95 Thus all the quotations alleged in Card. Gasparri's edition, especially S. O., Jan. 24, 1877 (*Coll.,* n. 1465); cfr. Benedict XIV, *De Syn Dioec.,* XIII, 22, 7.

96 Ulixbon., March 16, 1720; July 8, 1724 (Richter, *Trid.,* p. 246 ff., n. 88).

97 S. C. C., Jan. 31, 1891 (*A. S. S.,* t. 23, 711 ff.).

marry a Protestant or schismatic who was determined to make use of his sectarian conviction concerning the solubility of marriage, but would not stipulate this expressly with the Catholic party, the marriage would be valid.[98]

b) The second bonum is that of *conjugal fidelity,* which excludes polygamy and adultery. Hence if a man would marry a woman with the expressly stipulated condition: "I will marry you if you will deliver yourself up to adultery or prostitution for the sake of gain," [99] the marriage would be invalid. However, a mutual agreement would be required, otherwise the marriage would be valid, since no decent or honest person is supposed to ignore the unity of marriage, which excludes the sharing of one's body with another.

c) A condition against the *bonum prolis* would be, in the words of the decretal: *"si prolem evitaveris,"* if you will have no offspring.[1] The primary end of marriage would thereby be frustrated. But this point is disputed, especially on account of the *marriages called after St. Joseph,* and marriages contracted with the vow of perpetual chastity. To us it seems more conformable to the law and in accord with the essence of marriage to hold that the right to the body of the other partner which is conferred by the matrimonial consent is intended precisely for the purpose of bringing forth children (*ius ad copulam per se aptam ad generationem*), that in other words, it is not an abstract, but a practical right, intended for the use of marriage. Now, if the vow of perpetual chastity had been made by one party, the other would be obliged in justice not to make use of the right essentially inherent in marriage,[2] and consequently there would be the

98 S. O., Dec. 2, 1680 (*Coll.,* n. 221).

99 C. 7, X, IV, 5.

1 *Ibid.*

2 Thus Wernz IV, Vol. 2, p. 98, n. 302.

same contradiction noted above: to will and not to will; I will marriage, but not its rights and duties. Now any contract would be invalid if the object of the contract would be absolutely, radically and permanently refused. Note well that a vow must necessarily exclude the right to use marriage, otherwise it is only an imperfect vow. Neither is it admissible to distinguish between a sinful and a lawful condition, for not only does the law [3] not distinguish between sinful and lawful conditions, but the very nature of marriage does not admit this distinction. For its primary end is offspring,[4] and if this end is in any way wilfully and efficaciously excluded, there can be no marriage. Lastly, this vow must be, and is supposed to be, a mutual agreement and not to rest only in the mind, or be a one-sided affair. For we are dealing with *stipulations*. The conclusion is: a marriage such as the one described is null and void.

But what about the so-called *historical facts:* the marriage of the Blessed Virgin with St. Joseph,[5] that of Pulcheria with the Emperor Marcian, that of St. Henry II with St. Cunegundis? Concerning the first example we may safely follow St. Thomas,[6] who says that the vow of Our Lady was conditional, not absolute, because otherwise there would have been no marriage. If it had been absolute — without reference to the will of God who wished that marriage — there would have been a condition against the good of marriage, and the latter would have been null and void. As to the marriage between Pulcheria and Marcian there are no documents

3 Neither the Decretals, c. 7, X, IV, 5, nor our Code.

4 And for that very purpose marriage was instituted by the Author of nature, whence it cannot be sinful.

5 Cfr. *Zeitschrift für Kath. Theol.*, Innsbruck, 1888, p. 663 ff., where P. Flunk, S.J., discussed the matter very thoroughly.

6 Sent., IV, Dist. 30, q. 2, art. 1, gla. 2 ad 2.

proving an absolute vow attached to the consent in the shape of a genuine stipulation. Concerning St. Henry's union it is now morally certain that there was the impediment of impotence.[7] A rather peculiar case has been alluded to above.[8] A Portugese lady married a senator under the avowed condition, set down in writing, that she would enter a convent fifteen days after the marriage, make profession after the novitiate, never make use of her marriage rights and immediately renounce the same. (Given at Lisbon, May 6, 1718.) The marriage was declared null and void. Besides others the authority of St. Thomas was alleged, who says: "If a woman would tell a man: 'I marry you, provided you have no intercourse with me,' this would be no matrimonial consent, because the condition is repugnant not only to the act itself, but to the very purpose of carnal intercourse."[9]

A very practical case was that solved by the S. Congregation, July 17, 1904. It concerns the *onanistic use of marriage*. A man and a woman had married with the formal and explicit condition that they would have no children. The episcopal court gave a verdict of nullity, which the *defensor vinculi* tried his best to get reversed. But as the stipulation was proved by letters, supported by an oath of the man and by witnesses, the S. Congregation[10] confirmed the sentence, thus declaring the marriage invalid. Of course, if the intention to have no children would have been only a desire or wish not expressly stipulated, the verdict would have been in favor of validity.

3. If a *condition* attached to the consent and not with-

7 *Tübinger Quartalschrift*, 1905, p. 325 ff.; 1907, p. 563 f.

8 Ulixbon. (Richter, p. 246 ff., n. 88).

9 Sent., IV, dist. 28, art. 3 ad 3; other authors quoted in that case are: S. Bonaventure, Sanchez, Layman, Barbosa, etc.

10 Cfr. *Anal. Eccl.*, t. 12, 294 ff.

drawn *concerns the future and is lawful, it suspends the validity of the marriage* until the condition can be verified. If, for instance, one would set up the condition: "I marry you if I shall be elected to Congress," or "if you bring a dowry of $10,000," it would concern the future and be licit, but unless the stipulation were mutual, formal and lasting, the marriage would never be declared invalid, nor would it be conditional.[11] Suppose James married Gemma in 1919 under the condition above quoted: "If I am elected to Congress at the next election, in 1921." Provided they had observed the prescribed form, the marriage would become valid at the moment of James's election. But both would have to abstain from cohabitation or the use of marriage rights until the election was polled and ratified. After that no renewal of consent or anything else is required, because by the verification of the condition the marriage contract becomes complete.[12] Both parties may licitly and validly relinquish the condition and in that case the consent becomes absolute and no other formality is required,[13] but *the pastor* who assisted at the conditional marriage should be notified, in order to avoid misunderstanding.

Here it may be well to note that a conditional marriage, because not approved as a general rule by liturgical books and the practice of the Church, should never be contracted without first consulting the Ordinary.[14]

If the parties had carnal intercourse whilst the condition was still pending, they are by law supposed to have

11 S. C. C., Jan. 23, 1666 (Richter, *Trid.*, p. 244, n. 85). A woman married on condition that the husband should bring 400 scudi (= $4000) as a dowry; he failed; yet the marriage was valid, because she consented *libere;* S. C. C., Nov. 17, 1708 (Richter, *l. c.*, n. 86). A condition was made, but the parties contracted absolutely, and therefore the marriage was declared valid.

12 C. nn. § 1, 60, IV, 1.

13 C. 5, X, IV, 5.

14 Wernz, *l. c.*, IV, Vol. 2, p. 88, n. 297.

renounced the condition and thus made their conditional consent absolute. This is the doctrine of the Decretals [15] and it is not contradicted by the Code nor by the "*Consensus mutuus*" of Leo XIII, Feb. 15, 1892.[16]

The supposition that, pending the fulfilment of the condition, one can contract a valid marriage with a third person,[17] is fanciful, for now-a-days, when the form is so carefully prescribed, there is hardly a possibility of such an occurrence.

4. If the stipulated *condition* concerns *the past or present,* the marriage is either valid or invalid according to the verification or non-verification of the condition. Thus, if one would marry a woman under the condition: "If you are a virgin," the marriage would be objectively valid if the woman really were a virgin, but the marriage rights could not be made use of until the condition was verified.[18]

A case of a lawful condition not fulfilled was solved in 1918 by a commission of five Cardinals, all noted canonists. The lady had promised to marry a man if he was free from the taint of having had relations with another woman. This condition she mentioned on three different occasions to the would-be husband, and emphatically stated that her consent depended on and was subject to the quality alleged. Nor did she retract this condition before or at the marriage, though she did not formally renew it at the wedding, because, having stated it so absolutely, she could not add anything else. But the husband was found wanting in that very point, though he had asserted upon his word of honor that he had had no illicit relations with the other. After the marriage he

15 Cfr. cc. 3, 5, 6, X, IV, 5.

16 Wernz, *l. c.*, IV, Vol. 2, p. 90, n. 298.

17 Wernz, *l. c.*

18 Fagnani, in c. 7, X, IV, 5, nn. 13 ff.

frankly admitted that he had maintained such relations for twelve years with a woman who was even now nearer to his heart than the wife he had married. The five Eminences pronounced sentence of nullity because a real condition had been added to the contract which made the consent dependent on the existence or non-existence of the condition. This condition had never been revoked, nor was it verified, because the man had deceived the woman by his word of honor, and himself admitted after marriage that he had had illicit relations with another.[18a]

A similar case would be if a man would stipulate with his would-be wife: "I take thee if thou art not pregnant by another man." But it must be added that either written or oral testimonies would have to be brought to prove the existence of the condition; otherwise the ecclesiastical court neither would nor could pronounce sentence.

CONTINUANCE OF THE CONSENT

CAN. 1093

Etsi matrimonium invalide ratione impedimenti initum fuerit, consensus praestitus praesumitur perseverare, donec de eius revocatione constiterit.

Although marriage be invalid because of an impediment, the consent once given is presumed to continue until its revocation be proved.

The impediment must here be understood to be a diriment one. Therefore the question arises whether it was known to both or to one of the parties. If it was not known, this ignorance or good faith cannot render the marriage valid,[19] and the consent is presumed to continue.

18a See *A. Ap. S.*, Vol. X, pp. 388 ff.

19 S. O., July 4, 1855, § *Animadvertendum* (*Coll.*, n. 114).

However when such a case occurs, it must be examined, and if the impediment really existed, the consent must be renewed after the necessary dispensation has been obtained.[20] If the existence of an impediment was known, the psychological query arises: Is it possible to contract marriage in spite of an obstacle that would not permit a real union? Our Code has already settled that question in can. 1085, where it says that knowledge of the nullity of the marriage does not necessarily exclude the matrimonial consent. For the parties may persuade themselves that they are really married, although perhaps unlawfully. Here is a case: In Siam it is customary to marry without the usual ceremonies. If the parties prosper, they stay together and after four years are considered to be husband and wife. From this time onward their marriage is valid, though at the beginning it was a concubinage. The consent was not renewed after the four years, hence the first one persevered and was regarded as sufficient for a valid marriage.[21] However, it must be added that this can only take place when the marriage has the "name and claim" and resemblance of a marriage.[22] And the reason why the law most reasonably supposes the perseverance of the consent and an apparent marriage, lies in the assumption that the natural law cannot be so obscured in every race and among all men that no trace of it is left.[23]

Hence revocation of the consent must be proved. How is that done? For lack of texts we are thrown upon conjectures. Evidently a merely habitual or interpretative attitude of mind, by which one would not again consent

20 S. O., March 11, 1868 (*Coll.*, n. 1326). At the time of persecution in Japan many marriages were contracted with impediments.

21 S. O., Nov. 22, 1871 (*Coll.*, n. 1377).

22 S. O., Dec. 18, 1872 (*Coll.*, n. 1392).

23 S. O., Dec. 9, 1874, ad 2 (*Coll.*, n. 1427).

if he would know of the nullity of the marriage, would not suffice for proof.[24] Since according to can. 1086, § 2, a positive act of the will is required in order to invalidate a marriage, it seems reasonable to assume that the act of revocation must be manifested outwardly and proved by two witnesses, or, in case of necessity, by one witness duly sworn. The assertion of the party alone would never be considered sufficient in court, since it might be that the party would have his or her own interests too much at heart. Therefore *in causa Ulixbonensi* the point of defence turned about the question whether the condition had been revoked at the moment of the wedding. And the proof that it had not been revoked was furnished by the pastor and witnesses. The similarity between that case and ours is palpable. For the rest, since the plaintiff cannot be a witness at the same time in the same case, it is but natural that a third person must testify to the fact of revocation. Of course, the other party may also testify to the revocation. This would be brought about by proving the refusal of cohabitation, or desertion, accompanied by utterances like these: "I never intended to marry you," "I was deceived when I gave my consent and I am sorry I have ever seen you," "I have learned that our marriage is invalid and therefore I will have nothing to do with you any longer," etc. This proof, if given under oath, would doubtless establish the fact of revocation.

24 Feije, *l. c.*, n. 760, p. 780 (ed. 3).

CHAPTER VI

FORM OF CELEBRATING MARRIAGE

HISTORICAL NOTE

It is certain that Christians from the earliest times clothed the marriage union with a certain ceremony, which differed from that prescribed by the Roman law, though no doubt they also obeyed the civil laws. The letter to Diognetus[1] plainly says that Christians marry like all others. This supposes that the *Roman civil practice* was observed as far as it did not clash with their religious views. Thus marriage by *confarreatio*,[2] even

1 Cap. 5; Roberts and Donaldson, *The Antenicene Fathers*, New York, 1899, I, p. 26.

2 *Confarreatio, coemptio, usus*, were forms of a marriage *cum conventione in manu*, and *confarreatio* — from *farreus*, made of spelt, *viz.*, the cake — was a strictly religious ceremony performed in the house of the bridegroom, to which the bride had been conveyed in state, and in the presence of at least ten witnesses and the Pontifex Maximus, or one of the higher Flamens. A set form of words (*carmen, verba concepta*) was employed, and a sacred cake made of *far* (spelt) (*farreus panis*) — whence the term *confarreatio* — was either tasted or broken over the parties, who during the performance of the various rites sat side by side on a wooden seat made of an ox-yoke covered with the skin of sheep which had been previously offered in sacrifice. *Coemptio* was purely a legal ceremony, and consisted in the formal conveyance of the wife to the husband, according to the technical procedure in the sale of *res mancipii*. An imaginary sale took place on the part of the parent or guardian in the presence of five Roman citizens of mature age and a balance-holder (*libripens*), the husband or fictitious purchaser being termed *coemptionator*. A woman who remained with her husband for one whole year without absenting herself for three consecutive nights, passed in *manum mariti* by prescription (*usu*) as effectually for all legal purposes as if the ceremonies of *confarreatio* or *coemptio* had been performed. See Ramsay-Lanciani, *Manual of Roman Antiquities*, 1901, p. 295 f.; also Becker-Metcalfe, *Gallus or*

had it not fallen into disuse at the end of the Republic, would not have been compatible with Christian sentiment. Less closely connected with pagan practices were the marriages called *coëmptio* and *usus*. However, all these were but rarely employed at the beginning of Christianity. More common was marriage without the *conventio in manu*. In that case the woman remained under the legal control of her father or guardian, or was *sui iuris*, as the case might be; and when *sui iuris*, all the property which she possessed or inherited was at her own disposal with the exception that the Roman law made for the dowry. The ceremonies that surrounded such a marriage were of a domestic or private character. Betrothment preceded the regular marriage contract or wedding. However, festive solemnities accompanied the marriage even though it was a marriage *sine manu*. Whether the early Christians followed this custom is difficult to say. But one thing is certain, the ecclesiastical authorities were not neglected when Christians entered upon that union, although the legal formalities of *nuptiae iustae* may have been set aside. Thus St. Ignatius says: "It becomes both men and women who marry to be united with the consent (μετὰ γνώμης) of the bishop, that the marriage be according to the Lord and not according to lust."[3] And Tertullian exclaims: "How could I sufficiently praise that marriage which the Church accepts, the oblation ratifies, the blessing seals."[4] On a sarcophagus in the Villa Torlonia in Rome there is a sculptured representation of a marriage. The two figures join hands upon a reader's desk (*lectorium*), or, more correctly, upon the book of the gospels lying on

Roman Scenes of the Time of Augustus, 1898, p. 153 ff.

[3] *Ep. ad Polycarp.*, c. 5 (Antenicene Fathers, I, p. 95).

[4] *Ad Uxorem*, II, 19.

the desk. Between and above the two persons, one of whom is veiled, appears the figure of the Saviour, young and beardless. Here we no doubt have a representation of a Christian marriage celebrated before the fourth century.[5] We may also refer to some epitaphs which illustrate the Christian idea of an indissoluble union blessed by the Church.[6]

Tertullian calls a marriage not previously professed or celebrated in the Church mere concubinage.[7] We are told of the sacerdotal blessing by the IVth Council of Carthage, A. D. 398 (c. 13). This text seems to have entered a Capitulary of the Kings of France, which says that it is a sacred duty to celebrate marriages publicly, because from clandestine unions many sins arise, and therefore the parish priest must first be approached, and marriage contracted publicly before the whole congregation.[8] That Pseudo-Isidore should insist upon public weddings is but natural.[9] Jonas of Orleans mentions the necessity of sacerdotal intervention.[10] Gratian, Alexander III, and the IVth Lateran Council insist upon public marriages and the latter forbids clandestine unions most severely.[11] Yet none of them asserts that a marriage not contracted before the Church — *in facie Ecclesiae* — would be invalid, unless there was some other impediment.

TRIDENTINE DISCIPLINE

The Council of Trent (1545–1563) in its twenty-fourth session, after long discussion and thorough deliberation,

5 Armellini, *Lezioni di Archeologia Cristiana*, 1898, p. 369.

6 *Ibid.*

7 *De Pudicitia*, c. 4.

8 Mansi, *Coll. Conc.*, XVII *bis*, col. 1062 f.

9 Hinschius, *Decretales Pseudo-Isidorianae*, 1863, p. 87.

10 *De Instit. Laicali*, II, 2 (Migne, 106, col. 170 f.).

11 Ad c. 9, C. 30, q. 5; c. 4, Comp. V, IV, 4; c. 1, Comp. II, IV, 3; c. 3, X, IV, 3.

enacted the well-known decree "*Tametsi*" (c. 1), which governed the practice of the Church for more than 350 years. The formality required was laid down as follows: "Those who shall attempt to contract marriage otherwise than in the presence of the pastor (*parochus*), or of some other priest by permission of said parish priest or of the Ordinary, and in the presence of two or three witnesses, the Holy Synod renders wholly incapable of thus contracting and declares null and void, as it also invalidates and annulls such contracts by the present decree." The Ordinaries were enjoined to see to it that the decree was published in every parish church, and it went into effect in each parish thirty days from the date of its publication.

The practice generally followed up to 1908, as embodied in this decree, is the following:

1. The *parochus* is the pastor of one or both of the contracting parties (*parochus proprius contrahentium*). This has always been held in practice and by the School.[12]

2. Pastor and witnesses *must be present,* not only bodily, but also mentally, or *cum animo, i.e.,* they must realize what is going on.[13]

3. The requisite of promulgation in each and every parish caused a great deal of confusion, not only in Catholic parishes, but also in mixed communities.

a) In *Catholic countries,* these rules prevailed:

α) If *proof was furnished* from the statutes or archives, or other authentic documents, that the "*Tametsi*" was promulgated in a certain parish, all Catholics were bound to abide by it, under penalty of invalidity.

12 Cronin, *New Matrimonial Legislation,* 1910, may claim credit for having discovered that all canonists were mistaken in assuming the *parochus proprius.*

13 Pirhing, IV, 3, § 2, q. 6; a case in point is solved by the S. Rota, May 28, 1909, in *A. Ap. S.,* I, 524 ff.

β) *Presumption* was admitted in as far as *custom* in favor of the observance of the Tridentine form was considered proof that promulgation had been made; promulgation was presumed to have been made in a parish if it was made in the whole diocese.[14]

b) Concerning *mixed territories* a distinction was made, based on the supposition that the Tridentine law had a double character, personal and local, because it effected the contracting parties by reason of local promulgation. Three kinds of regions were distinguished in which promulgation was said to have been made:

α) In *overwhelmingly Catholic countries or territories,* where there were but few non-Catholics, who had no church or minister, and where the decree was certainly promulgated, not only *Catholics* but *non-Catholics* also were bound *to observe* it. Such countries were: Italy (with the exception of the island of Malta), France, Spain, Portugal, Belgium, Luxemburg, the Catholic Cantons of Switzerland, Austria, Bavaria, and the Spanish and Portugese colonies.

β) *Mixed countries* were those in which Catholics and non-Catholics lived promiscuously at the time of promulgation and had their ministers and temples. For the Netherlands, *e. g.,* Benedict XIV, on Nov. 4, 1741, issued his famous *Declaratio.* In all the countries to which this *"Declaratio"* was subsequently extended, *mixed marriages* and *marriages between baptized non-Catholics* were valid, even if the Tridentine form had been disregarded. In the United States the *Tametsi* was supposed to have been published, but to bind *only strictly Catholic marriages,* in the province of New Orleans, in the province of San Francisco together with the territory of

14 Benedict XIV, *De Syn. Dioec.,* XII, 5, 6; Leitner, *l. c.,* p. 300; Wernz, *Ius. Dec.,* IV, Vol. I, p. 216, n. 160.

Utah, save that part which lies east of the Colorado River, in the province of Santa Fe, except the northern part of Colorado, in the diocese of Vincennes, in the City of St. Louis and the parishes St. Geneviève, Florissant, and St. Charles of the same archdiocese, in Kaskaskia, Cahokia, French Village, and Prairie du Rocher, all situated in the diocese of Belleville.[15]

c) Finally, there were countries of a *preponderantly non-Catholic* type, where Catholics formed a small minority at the time the promulgation of the *Tametsi* was to be made. Here, unless promulgation could be clearly proved, the decree bound neither Catholics nor non-Catholics. Thus in the *United States* the following ecclesiastical provinces were exempt: Baltimore, Philadelphia, New York, Boston, Oregon, Milwaukee, Cincinnati (except the diocese of Vincennes), St. Louis (except the City itself and the places mentioned above), and Chicago (with the exception of the places mentioned in the Belleville diocese).[16] To this class also belonged England, Scotland, Denmark, Norway, several German provinces, Greece, Russia, Turkey, Japan, and China.[17] This summary of divergent practice proves emphatically how opportune was the change introduced by the pontifical decree *"Ne temere,"* of Aug. 2, 1907, which has now entered the Code.

Present Legislation Concerning the Valid Form of Marriage

The Code embodies the *"Ne temere"* with some modifications, and the whole of chapter VI may be divided into the following topics: Requisites of formal valid-

15 *Acta et Decreta Conc. Balt., III,* 1886, p. CVIII.

16 Smith, *Elements,* I, n. 659, p. 432.

17 Cfr. Zitelli, *Apparatus Iuris Eccl.,* 1886, pp. 394 ff. Wernz, *l. c.,* IV, Vol. I, p. 223, n. 163.

ity, requisites of valid assistance on the part of the pastor or Ordinary or delegate, requisites of licit assistance, special provisions for particular cases, local extension, prescribed rites of celebration, and registration.

REQUISITES OF FORMAL VALIDITY

CAN. 1094

Ea tantum matrimonia valida sunt quae contrahuntur coram parocho, vel loci Ordinario, vel sacerdote ab alterutro delegato et duobus saltem testibus, secundum tamen regulas expressas in canonibus qui sequuntur, et salvis exceptionibus de quibus in can. 1098, 1099.

Only such marriages are valid as are contracted before the pastor, or the Ordinary of the diocese, or before a priest delegated by either the pastor or the Ordinary, *and* at least two witnesses, in conformity, however, with the rules laid down in the two following canons, and with the exceptions mentioned in canons 1098 and 1099.

Two different kinds of persons are mentioned in the text as necessary to a valid marriage: the ministers of the Church and witnesses.

1) *The ministers of the Church* are the pastor or the Ordinary, or their delegate. Who is the *pastor?* The answer is given in can. 451. He is the priest upon whom the parish has been conferred as his own (*in titulum*) and who has the actual care of souls by the authority of the bishop. Therefore, a so-called habitual pastor is excluded. Nor are a chapter of canons or a religious superior, even though he be a prelate, if they have only habitual, not actual care of souls, entitled to assist at a marriage.[18]

What about priests in charge of so-called *stations or*

18 Can. 452 ff.

missions. If, for instance, a mission is attached to a monastery, which sends a priest once or twice a month, who is the pastor? If the mission belongs to an abbey church, which is at the same time a parish church, the pastor of the abbey church is the actual pastor of the mission church, and therefore has the right of assisting at marriages. Where a parish church has one or more mission chapels attached to the main parish and attended by the pastor's assistants, the latter cannot be considered as pastors,[19] but the pastor of the main parish is also the pastor of the mission chapels.[20] However, in our case, the missions being attached to a monastery, not to a church, the pastor of the mission would certainly be the *excurrens* or the priest sent by the monastery. Who else could be the pastor? Not the religious superior, because he is at most only a habitual pastor, who has nothing to do with marriages. Nor the pastor of the monastery-church, because the missions are, *ex hypothesi,* not attached to his church, but to the monastery. Hence only the Ordinary of the diocese would be left, who is and, as far as we know, always has been supposed to give the necessary faculties or authority to the priest who is in charge of such a mission.

The new Code, which is law also in our country,[21]

19 Woywod, *Marriage Laws,* 1913, p. 10 f.

20 A consequence is that the banns would have to be published in the main church.

21 The decree of the S. C. Consist., Aug. 1, 1919 (*Eccl. Rev.,* Vol. 61, p. 551 f.), seems favorable to our view. The decree refers to can. 1409, 1410, 1415, III. These deal chiefly with endowment. The fact that there may not be an absolutely sufficient endowment, should not prevent the Ordinary from erecting a parish, provided there are prospects that the most necessary revenues will be forthcoming. If a rector is appointed to subsidiary or accessory chaplaincies, what is his relation to the pastor? Suppose a parish organized by decree of the Ordinary comprises one, or two, or even five counties. All the bishop has to do is to define the accurate boundary lines and declare that, for instance, the parish at the county seat is *the* parish, and the priest in charge of it *the* pastor. This pastor

strictly prescribes the circumscription of parishes and the division of each diocese into parishes,[22] and hence there is but one secure way of settling the difficulty, *viz.:* to divide each diocese into parishes, no matter how large or small, and assign to each parish definite missions or stations. Since the State is distributed into counties, and the counties into townships, there is no reason for putting off a more definite ecclesiastical division *usque in indefinitum.* Then the priest who attends a mission or station will be dependent on the pastor of the parish to which the mission is attached, and the latter has to delegate the necessary faculties to him, either habitually — if the priest is merely an assistant of the main pastor [23]— or for each particular case.

Besides the pastor, there are others who certainly meet the requirements of the Code, *viz.:* (1) those mentioned in can. 451, § 2, n. 2, *as taking the place of a pastor* with full pastoral powers, *i.e.,* actual pastors of an incorporated parish or chapter; (2) the *oeconomi* or parochial administrators appointed by the bishops during the vacancy of a

then enjoys all the parochial rights set forth in can. 462. He publishes the banns (can. 1023), and it is not necessary that the publications be made in the subsidiary chapel, unless the Ordinary should so order. The position of the *rector* or chaplain of the subsidiary church is regulated by canons 479–486. However, there can be little doubt that the Ordinary may extend his rights. He may grant him the right to exercise parochial rights in his own chapel, though only under the supervision and with the consent of the pastor. The stole fees must be turned over to the pastor or be distributed *pro rata* according to the synodal statutes or episcopal provisions. The books must be kept by the pastor and all entries from the subsidiary chapel or church must be made in the parish books. The faculties for hearing confessions and preaching must be expressly imparted by the local Ordinary. Thus, we believe, there would be little difficulty in arranging matters according to the Code, even in case the rector has a residence distinct from that of the pastor. This was the case in former times when there was only one (the cathedral) parish in each city and the smaller rural parishes dependent upon the larger or more prominent ones.

22 Can. 216.

23 Can. 1096, § 1.

parish;[24] (3) *Substitutes* who take the place of pastors during vacation or a sudden absence, unless the bishop or pastor excepts assistance at marriages;[25] and (4) parochial coadjutors or assistants given to a disabled priest, if they take the place of the disabled pastor in all things.[26]

2) The term *Ordinary* comprises all those mentioned in can. 198, hence also the diocesan administrator, the *Abbas Nullius,* the vicar-capitular and the vicar-general, but not the superior of an exempt religious order.

Concerning delegation nothing need be said here, as can. 1096 will call for a full explanation.

3) The *witnesses* to a marriage must be present simultaneously with the minister of the Church, and both witnesses must be present at the same time.[27]

As to the *qualities* of the witnesses, a distinction must be drawn between valid and licit assistance.

Valid assistance can be rendered by all persons of either sex who are physically and mentally able to realize the meaning of the marriage contract. Non-Catholics, pagans, and infidels are not excluded. But *licit* assistance at Catholic marriages can be rendered only by Catholics, unless the Ordinary for grave reasons permits the assistance of non-Catholics, and provided no scandal is given.[28]

With regard to the admission of *Freemasons* we could find no positive prohibition. However, it appears certain that at least prominent Masons are not easily to be admitted,[29] on account of the scandal that might arise to Catholics. But the Ordinary may judge differently.

24 Can. 473.

25 Compare can. 474 with can. 465, §§ 4 f. Note that the exception must be made explicitly.

26 Can. 475, § 2.

27 S. C. P. F., July 2, 1827 (*Coll.*, n. 794).

28 S. O., Aug. 19, 1891 (*Coll. P. F.*, n. 1765).

29 S. O., Aug. 21, 1861 (*Coll. cit.*, n. 1219) says that these should be treated *veluti publici peccatores.*

REQUISITES ON THE PART OF PASTOR AND ORDINARY

CAN. 1095

§ 1. Parochus et loci Ordinarius valide matrimonio assistunt:

1.° A die tantummodo adeptae canonicae possessionis beneficii ad normam can. 334, § 3, 1444, § 1, vel initi officii, nisi per sententiam fuerint excommunicati vel interdicti vel suspensi ab officio aut tales declarati;

2.° Intra fines dumtaxat sui territorii; in quo matrimoniis nedum suorum subditorum, sed etiam non subditorum valide assistunt;

3.° Dummodo neque vi neque metu gravi constricti requirant excipiantque contrahentium consensum.

§ 2. Parochus et loci Ordinarius qui matrimonio possunt valide assistere, possunt quoque alii sacerdoti licentiam dare ut intra fines sui territorii matrimonio valide assistat.

§ 1. The pastor and the Ordinary may validly assist at marriages:

1.° *Only from the day* they have taken canonical possession of their benefice, or entered upon their office, provided they are not excommunicated, or interdicted, or suspended from office by a judiciary sentence, or declared suspended;

2.° Only within the *boundaries of their respective territory,* in which, however, they may validly assist at marriages not only of their own subjects, but also of non-subjects.

3.° Provided they are *not compelled* by violence or grave fear to ask and receive the consent of the parties.

§ 2. The pastor and the Ordinary of the diocese, who can validly assist at marriages, may also grant permis-

sion to another priest to assist validly within the limits of their respective districts.

The first paragraph contains *three distinct qualifications* required in those who may validly assist at marriages:

1) The *official* or *legal qualification* is attached to the official character of the functionary, and is twofold, strictly official and juridical.

a) The *strictly official* character is acquired by the assumption of an office. Hence the Ordinary as well as the pastor must be in actual possession of his office. The *Ordinary* takes canonical possession of the diocese by presenting his papers (bulls) of appointment either personally or by proxy, to the diocesan chapter or gathering of consultors in presence of the episcopal chancellor.[30]

The same is true concerning the *Abbas or Praelatus Nullius,* because he must be confirmed by the Pope;[31] the same also concerning the Administrator Apostolic.[32] The *Vicar-capitular* is in possession of his office after he has been validly elected and has accepted the office.[33] The *Vicar-general* is in possession of his office as soon as he has received and accepted the appointment.[34] The *pastor,* in the United States, is supposed, and justly so, to have the title of parish-priest after he has received his appointment to a pastorate. However, our text says *initi officii,* which means actual entrance upon office. A pastor may enter upon his office by merely taking possession of the parsonage in an informal way, or formally with the usual ceremonies.

b) The *juridical qualities* are apparent from the nega-

30 Can. 334, § 3.
31 Can. 320, § 1.
32 Can. 313, § 1.
33 Can. 435, § 1.
34 Can. 368, § 1.

tive description which says: *unless they (the ordinary or the pastor) be excommunicated, interdicted, or suspended from office by a condemnatory or declaratory sentence.*[35]

Three ecclesiastical censures are here mentioned, excommunication, the interdict, and suspension. No distinction between major and minor *excommunication* is made by the Code; but the difference between an excommunication inflicted by the law itself and one meted out by a judge is emphasized in the text. The former (*iure*) requires merely a *declaratory* sentence after the fact or deed which is proscribed under penalty of excommunication has been conclusively proved. But if an ecclesiastical *judge* inflicts this penalty for a crime not otherwise punishable by excommunication, he must not only have legal evidence, but formally pronounce sentence upon the culprit. It is immaterial whether the law reserves a case to the Apostolic See or to the Ordinary.[36] The Ordinary may reserve three or four cases, even under censure, and these too only need a declaratory sentence, after the culprit has been convicted.

An *interdict* is here understood to be a personal one, attended by the consequences which the Code mentions elsewhere.[37] But we believe that for its infliction a formal sentence is required.[38]

Suspension from office implies, as the Code says,[39] the loss of every spiritual power, but not of the administration of temporalities, including assistance at marriages. A priest guilty of trading with masses may be suspended,

35 Compare the *"Ne temere": "nisi publico decreto nominatim fuerint excommunicati vel ab officio suspensi."* (IV, § 1.)

36 To the Ordinary are reserved by law the excommunications mentioned in can. 2319; 2326; 2343, § 4; 2350, § 1; 2385; 2388, § 2.

37 Can. 2274 f.

38 Comp. can. 2269, § 1: *episcopus ferre potest.*

39 Can. 2279, § 1; such suspensions are mentioned in can. 2324, 2342, n. 1; 2347, n. 2; 2350, § 2; 2378; 2392, n. 3; 2394, n. 2.

but the sentence must be not merely declaratory, but condemnatory.[40] In fact, most suspensions require a condemnatory sentence.

After a priest has been declared excommunicated, interdicted or suspended from office, or condemned to suffer such a penalty, nothing else is required for disqualifying him for the function here in debate, because the Code does not mention a declaration or condemnation by name or public decree. However, it seems reasonable to demand that the parish be notified of the verdict. If this is not done, it might happen that a *titulus putativus* would arise, based upon a general error. In that case, of course, the marriage would be valid.[41] A bishop may be censured by the Holy See only, a vicar-general, by his bishop.

2) The *local condition* is expressed by the boundaries: the pastor is authorized to assist at marriages within the limits of his entire parish, the Ordinary within the whole of his diocese. And this holds concerning all marriages, whether the parties belong to the respective parish or diocese or to a foreign parish or diocese. Here is the cardinal change, and a very practical one, from the Tridentine law.[42]

However, as no law can provide for all imaginable cases, this, too, is not without difficulties, not so much concerning the diocese, as the parish. For while dioceses are almost always well defined and circumscribed, parish limits are often uncertain and vague, especially in our country. There are, for instance, in the cathedral city of St. Joseph, Mo., eight parishes. The five English speaking congregations are pretty well defined territorially, and the two Polish churches are also set off be-

40 Cfr. can. 2324 and can. 827 f.
41 S. C. C., March 10, 1770 (Richter, *Trid.*, p. 229, n. 51).
42 Cfr. "*Ne temere*," Procem.

tween North and South, but the German parish lies between two English speaking parishes without any boundaries.[43] A decision of the S. C. Concilii, Feb. 1, 1908, allows the pastor of the German speaking parish to assist validly at all marriages, not only in his own church or rectory, but also in any place within the entire district over which he has jurisdiction together with the other two pastors. If there were no boundary at all, the pastor of the German church might validly assist at any marriage in any of the eight churches or rectories. The consequence is that the pastors of the English speaking congregations, or of parishes with set boundaries, are worse off than this quasi-pastor of a foreign tongue.[44] Remember, we speak only of *valid* assistance; for it is within the power of the Ordinary to punish any pastor who would attempt to assist at marriages promiscuously without regard to the rights of other pastors.

What has been said so far may be applied to assistance in a *private house,* should sickness (not involving danger of death) render this advisable. For as long as the pastor keeps within the boundaries of his district, or (if his parish has no definite limits, as in the case of the German priest mentioned above) within the boundaries assigned by other parishes, he observes the law, and assistance is not limited to the church or rectory.

In another case a monastery of *exempt regulars* had charge of a church which is not a parish church, but situated within another parish. The question arose: May the parish priest assist validly in that church? Yes, said the S. Congregation.[45] Of course this also applies to Ordinaries.

43 Except, as far as we know, towards the east (Wyatt Park).

44 Cfr. Woywod, *Marriage Laws,* p. 14.

45 S. C. Sacr., March 10, 1910, ad VIII.

Canon 464, § 2, permits the Ordinary to exempt from the pastor's care *religious houses* and *pious institutions*. Who is to assist at marriages celebrated in such places? The authentic answer[46] given is that the chaplains of these places may validly assist at the marriages of such parties as are committed to their care, but only in the place where these chaplains exercise their jurisdiction and provided they possess full parochial charge. This is supposed to be the case when exemption has been granted by the bishop.

Another case has been decided concerning a *few families* who live in one parish, but for some reason or other belong to another. May the pastor of the latter parish assist at the marriage of such parties if it takes place in the former? Yes, says a decision, provided that at least one of the contracting parties belongs to him.[47] There is no stretching allowed. The persons and families concerned must be subjects of the pastor, and we believe the Ordinary alone can decide whether a family or person may belong to another than the locally defined parish.

Military chaplains usually receive special instructions. If not, the pastor within whose district the barracks or camp lies, is *per se* competent for valid assistance at the marriages of soldiers. In the field, the military chaplain would be competent.[48]

3) The last condition may be called *ethical* because it requires an assistance that is a human act, performed

46 S. C. C., Feb. 1, 1908, ad X; cfr. Richter, *Trid.*, p. 228, n. 47.

47 S. C. C., Feb. 1, 1908, ad IX, quoted by Card. Gasparri. But the interpretation — which looks rather extensive — needed the addition: "*facto verbo cum SSmo.*" Cfr. Richter, *Trid.*, p. 228, n. 44.

48 S. C. C., May 29, 1683; Sept. 19, 1733 (Richter, *l. c.*, p. 234, n. 60 f.); S. C. C., Feb. 1, 1908, ad VII. Of course, all depends upon the instructions the army bishop has received.

with freedom and deliberation. Such an act excludes all manner of *physical compulsion.* Hence if the pastor would be perforce compelled to assist at a marriage, say, by the police or by armed men surrounding his rectory, the marriage would be invalid. Again if serious threats of any kind would impede his freedom of action, the marriage would be invalid by reason of *grave fear.* Placed in such a position, an authorized witness may hardly be said to *ask for and receive the consent.* Note well the wording of the Latin text. Compulsion and fear must influence the act of demanding and receiving the consent, so that there is a causal connection between both. As long as this compulsion or fear lasts, the marriage would be invalid.[49] The terms *"requirere"* and *"excipere"* suppose a personal act on the part of the pastor; we might style it *coöperation,* in order to distinguish it from purely passive assistance, about which see can. 1102. Hence *surprise marriages* are almost entirely excluded. Thus a marriage whilst the pastor hears confession is hardly possible any more; it happened once at Naples, in 1724, but was declared invalid.[50] On the other hand the Code omits the words of the *"Ne temere"* decree: *"invitati ac rogati," i. e.,* invited and asked by the parties. Suppose a pastor is asked to a house in his parish for some reason and there requested to witness a marriage. If he demanded and received the consent of the parties without being compelled to do so by physical coercion or by grave fear, the marriage would be valid. Purely human respect is not tantamount to grave fear. Of course, the priest is supposed to know what is going on. If a formula in a foreign language of which he has not the faintest knowl-

49 Such cases may be read in Richter, *Trid.,* p. 234, n. 63; Benedict XIV, *De Syn. Dioec.,* XIII, 23. In Italy confessions are often heard publicly on benches or chairs in the church.

50 Richter, *Trid.,* p. 235 f., n. 66.

edge were given him to read off, this act could not be properly called *human* and would therefore be insufficient for valid assistance.[51] The rite is described in can. 1100 ff.

The second section (§ 2) of canon 1095 permits *delegation or permission,* and may just as well be explained in connection with canon 1096.

REQUISITES OF DELEGATION

Can. 1096

§ 1. Licentia assistendi matrimonio concessa ad normam can. 1095, § 2, dari expresse debet sacerdoti determinato ad matrimonium determinatum, exclusis quibuslibet delegationibus generalibus, nisi agatur de vicariis cooperatoribus pro paroecia cui addicti sunt; secus irrita est.

§ 2. Parochus vel loci Ordinarius licentiam ne concedat, nisi expletis omnibus quae ius constituit pro libertate status comprobanda.

Permission to assist at marriage, given under can. 1095, must be granted to a specified priest for a specified marriage. General delegations are excluded, except in case of assistant coadjutors for the parish to which they are appointed; in all other cases general delegation is invalid.

The pastor or Ordinary of the diocese shall not grant such a permission unless he has complied with the regulations of the law for establishing the free status of the nupturients.

Here we have the *modus* of delegation, after can. 1095

51 If the priest would merely feign or affect ignorance, the marriage would be valid; cfr. Richter, *Trid.*, p. 235, n. 63.

has stated the fact. Section 2 sets up a necessary condition.

1) Can. 1095, § 2, provides that a pastor or Ordinary who himself can validly assist at a marriage, may give permission to another priest to assist, if the marriage is to be celebrated within the boundaries of the parish or diocese, respectively. Hence it is required that the *delegans* is himself entitled to assist. "*Nemo dat, quod non habet.*" But if a pastor or Ordinary is endowed with the qualities described in can. 1095, § 1, he may apply the two *Regulae Iuris in* 6° which say that one may do through another what one has a right to do himself, and what is done by that other is as valid as if done by the *delegans* himself.[52]

2) The *modus facti* or manner of delegation is set forth in can. 1096, § 1. Of delegation in general enough has been said in Vol. II. Here we may note:

a) The delegation must be made to a *priest,* and hence, as formerly,[53] the priestly character is absolutely required.

b) *Presumed delegation is not admissible.* This is the meaning of the word *expresse* in the text. Therefore even if probable conjectures, or former grants given without the least opposition, furnished a presumption, it could not supply express delegation, nor would it suffice for valid assistance. The fact, also, that the priest must be specified excludes presumption.

52 *Reg. Iuris* 68, 72 in 6°. Formerly even a censured pastor could give permission to another priest. Sanchez, *l. c.,* III, disp. 20, n. 7; disp. 21, n. 1 f.; Ojetti, *In Ius Pianum,* etc. Now, can. 2095, § 2, is too definite to admit such a delegation.

53 *Trid.,* sess. 24, c. 1, *de ref. mat.*: "*Vel alio sacerdote de ipsius parochi seu Ordinarii licentia,*" although the pastor himself did not need to be a priest. If we call that permission *delegation,* this is done for the sake of convenience, because it is at least similar to delegation. Wernz, *l. c.* IV, Vol. 1, p. 268.

c) The delegated priest must be *specified,* or, as the Latin has it, *determinatus.* This is done by giving the name in full, and if there should be two priests of the same name, by adding his residence, office, or occupation. Since this permission need not be given in writing, a priest, if present, may receive the delegation there and then.

Subdelegation is not excluded, but must take place in the same specific manner. To insure the validity of delegation in cases where it is uncertain whether the priest who is asked by the pastor to assist at a marriage will be free on the appointed day or may have to request another priest to attend to the matter, it will be advisable always to add "or any priest whom you may send." [54]

d) Not only the priest, but also the *marriage must be specified.* The wording of our canon is more precise than that of the "*Ne temere.*" It means that delegation must be given for each single marriage, and not for a number of cases *in globo.* For instance, a pastor would not be allowed to grant permission to an Italian priest to assist at all Italian marriages in his parish. On the other hand, he may give permission, *e. g.,* for "the five marriages which occur during that week and the banns of which have been published," because in that case the marriages are sufficiently specified. The contracting parties cannot be permitted to choose or call any one they please without the pastor's consent.

e) The Code *excludes all general delegation.* It was formerly customary in some large cities for pastors to give permission to one another to assist at any marriage that would come up. Such a general delegation, notwithstanding the answer given by the S. Congregation,[55] July 27, 1908, is no longer to be considered valid.

54 Woywod, *l. c.,* p. 23.

55 S. C. C., July 27, 1908, ad IV.

f) An *exception is made in favor of assistant priests,* as defined in can. 476, *i. e., coadiutores* or *cooperatores.* These, says the Code, may receive general delegation from the pastor. In illustration we may quote an authentic interpretation.[56] It happens, says the questioner, that assistants of pastors are appointed by the bishop without special faculties for assisting at marriages, and it has become customary that these assistants, without asking the pastor's permission, assist at marriages, because the pastor made no opposition, and they also registered the marriages under their own name; nay in larger parishes these assistant priests nearly always assist. What is to be said concerning this custom? The answer was that the marriages were valid, or rather that there was no reason for scruples, but that the prescribed rules should be observed and that the regulations laid down by a provincial council could be enforced against the pastors. Our Code makes reference to this decision.[57] In this country assistants, whose status is according to can. 476, may validly assist at marriages with the general or tacit delegation of the pastor. But this delegation is not given if the pastor expressly reserves assistance at marriages to himself.

It goes without saying that delegation entitles the assistant (or delegate) to assist at marriages *only in the district subject to the delegans.* The Ordinary, bishop or vicar-general may delegate a priest to assist at marriages in any parish of the diocese.

As to the *qualities* of the delegate our Code only says that he must be a specified priest, without mentioning the requirements or conditions laid down in the "*Ne temere*"

56 S. C. Sacr., March 13, 1910.

57 It is quoted in Card. Gasparri's edition; but must certainly be restricted to assistants as described in the text.

(art. VI). It seems certain, however, that a censured priest could not validly be delegated, because an excommunicated priest is not allowed to perform any ecclesiastical act,[58] whilst one who is suspended from office loses the right of exercising the functions attached to that office, and in fact all rights connected therewith.[59] Besides it would doubtless be a serious neglect of ecclesiastical discipline, amounting to contempt of weighty penalties, were one to give permission to a censured priest to assist at a marriage.

§ 2 repeats the *necessity* of *ascertaining* the *free status* of the contracting parties before granting permission to another priest to assist at their marriage. Hence the pastor or Ordinary himself, and not the delegated priest, must examine the parties, attend to the publication of the banns, and, in case of doubt, conduct the necessary investigation, as explained under can. 1031. This paragraph does not affect *valid* assistance.

REQUISITES OF LICIT ASSISTANCE

CAN. 1097

§ 1. Parochus autem vel loci Ordinarius matrimonio licite assistunt:

1.° Constito sibi legitime de libero statu contrahentium ad normam iuris;

2.° Constito insuper de domicilio vel quasi-domicilio vel menstrua commoratione aut, si de vago agatur, actuali commoratione alterutrius contrahentis in loco matrimonii;

3.° Habita, si conditiones deficiant de quibus n. 2, licentia parochi vel Ordinarii domicilii vel quasi-domicilii aut menstruae commorationis alterutrius contra-

58 Can. 2263.

59 Cfr. can. 2281, 2284.

hentis, nisi vel de vagis actu itinerantibus res sit, qui nullibi commorationis sedem habent, vel gravis necessitas intercedat quae a licentia petenda excuset.

§ 2. In quolibet casu pro regula habeatur ut matrimonium coram sponsae parocho celebretur, nisi iusta causa excuset; matrimonia autem catholicorum mixti ritus, nisi aliud particulari iure cautum sit, in ritu viri et coram eiusdem parocho sunt celebranda.

§ 3. Parochus qui sine licentia iure requisita matrimonio assistit, emolumenta stolae non facit sua, eaque proprio contrahentium parocho remittat.

§ 1. The pastor or the Ordinary of the diocese assist at a marriage licitly:

1) After having ascertained the free status of the contracting parties, as the Code prescribes (especially in can. 1029–1031), and after the publications of the banns have been made or dispensed from.

2) After having ascertained the fact of domicile or quasi-domicile or monthly stay of at least one of the parties in the place where the marriage is to take place, or of actual stay in the case of *vagi.*

Note the *four different* kinds of *local conditions* which affect, not the validity, but the licitness of assistance.

The first is *domicile,* that is to say, residence in a place combined with the intention of remaining there forever, if nothing calls one away, or actual residence for ten consecutive years.

Quasi-domicile is residence in a place with the intention of staying there the greater part of a year. This intention, as we said under can. 92, may be present on the first day on which one takes up his residence in a parish.[60] A man who was hired for one year, or an official who has

60 S. O., June 7, 1867 (*Coll. P. F.*, n. 1305).

taken up residence at the capital for the term of his office, would certainly have a quasi-domicile. The same is true of people who have a summer and a winter residence. The *monthly stay,* although apparently new in this connection, is not entirely recent, so far as presumption is concerned. For Benedict XIV stated [61] that a sojourn of one month in a place permits the presumption (*praesumptio iuris*) that the party will stay there for the greater part of the year. Here we have the genesis of the monthly stay, which at first was merely an indication of intention, which, being internal and secret, can not easily be proved.[62] From that, in order to do away with scruples, the legislator prudently proceeded to the mere fact of a month's stay, declaring it sufficient for licit assistance.

A month must be taken as *thirty consecutive days,*[63] (though the calendar month of February would be sufficient). These thirty days must be morally uninterrupted according to common parlance. Of course one or two days' absence, even if repeated once or twice, would not, properly speaking, interrupt that term.[64] Neither is any inquiry into the intention to be made.

The last kind of local residence is *actual stay* in the case of *vagi.* A *vagus* is one who has left his or her domicile or quasi-domicile and stays in no one place for thirty days. Sometimes people move into a parish a day or two before marriage and want to get married before moving further. The evening of their arrival they go to the pastor and ask to be married the next morning. Setting aside for the moment the legal requirements, we must say that the pastor may assist at their marriage.

61 "*Paucis abhinc,*" March 19, 1758; S. O., *l. c.*

62 S. O., *l. c.;* Nov. 9, 1898 (*Coll.,* n. 2025).

63 Can. 32.

64 Vermeersch, *l. c.,* p. 32, n. 58; Wouters, *l. c.,* p. 52.

But here there again arises the question of *diocesan domicile.* Those who have a domicile or stay for a month in a diocese cannot be called *vagi.*[65] Who may assist licitly at their marriage? The answer is: the pastor. He must inquire about them, and if he finds that they have moved about the diocese to which he belongs for at least a month, he may marry them by reason of a monthly stay in the diocese. If he finds that they have roamed about in various dioceses, he may assist by reason of their being *vagi.* However, a restriction must be made. If we say, "the pastor may assist," we suppose that the Ordinary has given him permission to do so. The reason is that, as diocesan domicile cannot be contracted in a parish,[66] the proper superior of one who has only a diocesan domicile is the Ordinary, and not the pastor.[67]

Concerning *minors, i. e.,* such as are under twenty-one years of age, they may follow the domicile[68] or monthly stay of their parents or guardians, and besides, are entitled, in case of marriage, to be treated like those who are of age, because the legislator makes no distinction.

Finally, we would draw attention to the text: *alterutrius contrahentis.* If the bride has spent a month at a place, she may get married there, although the groom has a domicile in a different parish. The same holds good concerning *vagi.* Thus if a rover has gotten a bride in one place and wishes to move with her to another, the pastor or Ordinary of the latter place, as explained above, is allowed to assist at the marriage, even though the groom returns with his wife to the latter's domicile the day after.

65 S. C. Sacr., March 13, 1910, ad V (*A. Ap. S.,* II, 197).

66 Can. 92, § 3.

67 Gennari, *Breve Commento della Nuova Legge sugli Sponsali e sul Matrimonio,* ed. 4, 33; Wouters, *l. c.,* p. 51.

68 Can. 93, § 1.

3) If the conditions set down under the preceding number (2) are not verified, the pastor or Ordinary, in order to assist lawfully at a marriage, must have the permission of the pastor or Ordinary of the place where one of the contracting parties has a domicile or quasi-domicile or monthly stay, except in the case of *vagi*, who are actually on the road and have no residence or stay anywhere, or unless a weighty reason excuses from demanding such permission.

James and Gemma wish to get married in the cathedral parish of St. Joseph, Mo., where neither of them has a domicile or quasi-domicile or monthly habitation, their domicile being at Maryville, Mo., in the same diocese. What is to be done? The pastor of the cathedral parish must ask permission of the pastor at Maryville. But the bishop of the diocese, if he wishes to assist at the marriage in the cathedral parish, need not ask permission from the Maryville pastor, because James and Gemma are supposed to have lived in his diocese at least one month. But if both parties belonged to the Kansas City diocese, and wished to have their marriage performed by the bishop of St. Joseph, the latter would have to ask permission either from the pastor of the bride in the Kansas City diocese or from the bishop of Kansas City.

No preference is given to domicile over quasi-domicile, or to the latter over a monthly sojourn. Hence, if the bride lived only one month in a parish, the pastor thereof could give the permission, although the bridegroom might have a domicile in a parish whose pastor is to be asked for permission.[69]

This license is *not required* if there is a serious reason excusing the pastor from asking it. The text says *gravis*

[69] S. C. Sacr., March 13, 1910 ad V; S. C. C., March 28, 1908 ad V.

necessitas, and therefore it must not be easily presumed, because it is a violation of a strictly parochial right.[70] A grave reason would be the probable fear of a civil marriage, or the refusal of the parties' own pastor to marry them — perhaps on account of some differences of opinion, or of travelling expenses, or the accidental presence of parents or friends.[71]

§ 2. Every marriage should be performed before the pastor of the bride, unless there are just reasons for breaking the rule. If the parties belong to different rites, their marriage must be celebrated in the rite and before the pastor of the bridegroom, unless particular laws dictate otherwise.

The custom favoring the *pastor of the bride* is an old one, but good or plausible reasons justify a departure from it. Thus, for instance, military chaplains are preferred.[72] Other reasons for deviating from it are sudden departure, elopement, objections raised by parents, etc. As to the different *rites,* the Code here follows the rule laid down in can. 98, and gives preference to the rite of the bridegroom, adding, however, that particular laws may dictate otherwise. Thus Benedict XIV had ruled for the Greeks of Southern Italy and Sicily that if the marriage was to take place between a Latin man and a Greek woman, the pastor of the former should assist, but if the man belonged to the Greek rite, he might choose either, Latin or Greek.[73] The bishops of the Ruthenian and Latin rites of Lemberg made an agreement (Dec. 23, 1853) to the effect that marriages should always be

70 Gennari, *l. c.,* p. 27, and Vermeersch, *l. c.,* p. 33, admit presumed reasons.

71 Wernz, l. IV, Vol. I, p. 294, prudently observes that the pastor who assisted for reasons should keep some documents at hand which would prove the existence of these reasons.

72 *Ib.,* p. 295.

73 "*Etsi pastoralis,*" May 26, 1742, § VIII, n. XI f.

celebrated before the pastor of the bride, unless both parties demanded the contrary.[74] These regulations have not lost their force, but persons who come to the United States should not be troubled on account of them. As to the *Ruthenian Rite* in our country, the following regulations have been made by the Apostolic See: the Latin rite must be followed if the marriage is contracted between a Latin man and a Ruthenian woman; if the bride is of the Latin and the groom of the Ruthenian rite, the parties may choose the pastor of either rite.[75]

§ 3. Pastors who assist at marriages without the permission required by law, *are not allowed to keep the stole fees,* but must hand them to the parties' own pastor. This ruling follows, at least partly, from can. 463, § 3. The present canon restricts the obligation of refunding to cases of illicit assistance. Hence if the conditions prescribed in this canon have been complied with, the stole fee may be kept by the assisting pastor. This rule also obtains in cases of necessity, where no permission was required. The Ordinary is also bound by the law.

A strict parochial right can be claimed by the pastor of the bride only, and therefore, if the pastor of the bridegroom should assist against the former's will, the latter (the bride's pastor) may see the bishop or vicar-general about it. But restitution cannot be claimed in justice, wherefore the Code says that the stole fee must be refunded to the parties' own pastor, not to the bride's pastor.

Lastly the question may be asked: What about a pastor whose congregation is scattered over more than one parish — *e. g.,* an Italian pastor whose people are dis-

74 S. C. P. F., Oct. 6, 1863 (*Coll.*, n. 1243).

75 *Lit. Apost.*, June 14, 1908 (*Am. Eccl. Rev.*, Vol. XXXVII, p. 512).

tributed throughout a city where there are other parishes territorially divided? This case, so far as we are aware, has not been authentically decided. But it stands to reason that if an Italian should marry a girl of an English speaking parish, the pastor of the latter would be entitled to assist, unless the groom refused to go to him. Besides, we believe that if the bride would join the Italian congregation a month before the marriage, the pastor of the English parish would forfeit every right to assistance.[76] At any rate the Code permits the pastor of the bridegroom to judge of the sufficiency of the reasons.

TWO SPECIAL CASES

CAN. 1098

Si haberi vel adiri nequeat sine gravi incommodo parochus vel Ordinarius vel sacerdos delegatus qui matrimonio assistant ad normam can. 1095, 1096:

1.° In mortis periculo validum et licitum est matrimonium contractum coram solis testibus; et etiam extra mortis periculum, dummodo prudenter praevideatur eam rerum conditionem esse per mensem duraturam;

2.° In utroque casu, si praesto sit alius sacerdos qui adesse possit, vocari et, una cum testibus, matrimonio assistere debet, salva coniugii validitate coram solis testibus.

If the pastor, or the Ordinary, or a priest delegated

76 A decree of S. C. P. F., April 26, 1897, rules that anyone who is sufficiently versed in the English language may freely choose an English speaking congregation. Conversely it may justly be maintained that a party sufficiently conversant with Italian — because he or she had been in Italy for a number of years — may join an Italian congregation.

by either, as prescribed by can. 1095 and 1096, cannot be had without great inconvenience, then:

1) In danger of death marriage may be validly and licitly contracted in the presence of two witnesses; the same holds good also where there is no danger of death, provided it may prudently be foreseen that this condition of things will last for a month.

2) In both cases, however, if a priest is available, he must be called and assist at the marriage together with the two witnesses; but the marriage is valid if contracted in the presence of the witnesses alone.

The wording of our canon betrays a modification or mitigation of the "*Ne temere*" (VII and VIII).

1. The *danger of death* need not be imminent,[77] but it must be probable or likely. Neither, of course, is it necessary that *both* parties be in danger.

2. The second case touches *peculiar conditions*. It may happen in our country that a pastor visits his mission only once a month or even less often. Note the wording of the text, which says nothing of a region or district.[78] Therefore it must now be held that provincial or regionary reasons have nothing to do with the case, but merely personal reasons, which indirectly may be due to local conditions, are here considered. But the condition must last one month (thirty days) or rather it must be foreseen that it may last that long.

3. That assistance without the pastor or the Ordinary or a delegate of either be allowable and the marriage be valid, the impossibility of having such an authorized witness must be verified. The text says: (a) if they cannot be had or reached (*haberi aut adiri*). The first term, *to have,* means that the pastor cannot come, or is

77 The "*Ne temere*" had that apposition.

78 "*Ne temere*" reads: *in aliqua regione.*

not available because of sickness, or absence, or for some other reason. To *reach* or to approach signifies that the parties themselves have made an effort to get the pastor by calling him by ordinary means of communication, *i. e.,* letter or messenger. The telegraph and the telephone are not regarded as ordinary means, and justly so, for a country telephone line is often not only unsafe, but liable to abuse on account of the publicity involved. Moreover, conditions may be unsafe for travellers, as in times of war, flood or quarantine. (b) The text furthermore says: *without great inconvenience,* which is a rather elastic term. An inconvenience would be great if the expenses were above the means of the parties concerned, or if one party would have to leave the other alone sick. Now-a-days automobiles are a great help to swift and agreeable travelling. The parties themselves must conscientiously judge as to the character of an existing inconvenience. (c) The text also says that in case of sickness or other impossibility *a priest should be called who can be present.* This priest may be any priest, even one under censure, or of some other diocese, because "*qui adesse possit*" must, we believe, be taken in the sense of physical, not moral, possibility. But the priest must be at hand (*si praesto sit*); the parties need not search for him. The assistance of a priest at the marriage is very convenient, because he may dispense from the impediment of clandestinity and others (can. 1043) if there is danger of death. This is the meaning of an answer given by the S. Congregation [79] to the following query: "In several districts the pastors are not allowed to assist before the civil marriage is contracted; and yet this cannot be done in every instance, although for the spiritual welfare of the parties it would be expedient to have them married.

79 S. C. Sacr., Jan. 31, 1916 (*A. Ap. S.,* VIII, p. 36 f.).

What should the Ordinaries do? Resp. Recourse must in each case be had to the S. Congregation, except when there is danger of death, in which case any priest may dispense." (d) Lastly, calling a priest does not *affect the validity of the marriage,* which therefore may be contracted validly in the presence of only two witnesses. We hardly believe that the second case is of frequent occurrence now-a-days, except in missionary countries.

EXTENT OF THE LAW WITH REGARD TO THE FORM

Can. 1099

§ 1. Ad statutam superius formam servandam tenentur:

1.° Omnes in catholica Ecclesia baptizati et ad eam ex haeresi aut schismate conversi, licet sive hi sive illi ab eadem postea defecerint, quoties inter se matrimonium ineunt;

2.° Iidem, de quibus supra, si cum acatholicis sive baptizatis sive non baptizatis etiam post obtentam dispensationem ab impedimento mixtae religionis vel disparitatis cultus matrimonium contrahant;

3.° Orientales, si cum latinis contrahant hac forma adstrictis.

§ 2. Firmo autem praescripto § 1, n. 1, acatholici sive baptizati sive non baptizati, si inter se contrahant, nullibi tenentur ad catholicam matrimonii formam servandam; item ab acatholicis nati, etsi in Ecclesia catholica baptizati, qui ab infantili aetate in haeresi vel schismate aut infidelitate vel sine ulla religione adoleverunt, quoties cum parte acatholica contraxerint.

§ 1. The following are bound to observe the form prescribed above:

1.° All persons baptized in the Catholic Church, as

well as those converted from heresy or schism, even though they (whether Catholics or converts) have afterwards fallen away, as often as they contract marriage among themselves;

2.° Catholics as well as converts (n. 1) who marry non-Catholics, either baptized or non-baptized, even after having obtained a dispensation from the impediment of mixed religion or disparity of cult;

3.° Orientals who marry persons of the Latin Rite who are bound by that form.

This first section of can. 1099 positively and exhaustively enumerates all those classes of persons who are obliged to observe the form laid down in can. 1094.

1.° The first class is that of *Catholics marrying among themselves*. It is important to define more closely the terms used in the text.

(a) "*Omnes in catholica Ecclesia baptizati,*" all persons baptized in the Catholic Church. Baptized in the Catholic Church is a phrase not so easily interpreted as would appear at first sight.[80] No doubt those are "baptized in the Catholic Church" who, by their own free will, or the will of their parents or tutors, have become incorporated in the Church through Baptism. This intention is even more evident if the minister employed the Catholic rite. Neither may there be doubt as to Catholic Baptism conferred in case of necessity, if the parents are known to be Catholics; or, where one is not a Catholic, the party that exercises the decisive influence in the matter of education is a Catholic.[81] But what if the child

80 The *Am. Eccl. Rev.*, 1914, Vol. LI, p. 359, contains a case in point, but I cannot agree with the author's contention that only a child baptized by an official of the Catholic Church may be looked upon as "baptized in the Church"; the rights of parents are curtailed by this interpretation.

81 S. O., Aug. 1, 1883, ad 5 (*Coll. P. F.*, n. 1605); Wernz, l. c., IV, Vol. I, p. 305.

was baptized in a foundling asylum or hospital, the character of which is not exactly Catholic: or if the Baptism was conferred in a Catholic asylum by a non-Catholic physician or nurse, who did not know the religion of the parents? For instance, if a Jewish physician or nurse had baptized a child, could that child be called "baptized in the Catholic Church"? To the general intention "to do what the Church does,"[82] another would have to be added, *viz.*, that of making the subject to be baptized a member of the religious body known publicly as the Catholic Church. In other words, the Jewish physician or nurse would have to have the intention of incorporating the child into the Catholic Church. Such an intention cannot be presumed, but must be proved. It may be proved by the baptismal record, which should therefore contain, in such cases, a clause indicating the minister and his intention. If it be objected that there is only one Baptism and one Church, and therefore Baptism inevitably makes the baptized person a Catholic, we reply: All that is true, dogmatically speaking, and it is also true that by Baptism one is subjected to the whole law of Christ and no longer free to reject the precepts of the Church.[83] However, the supreme legislator of the Church has the power to exempt certain individuals, or any class of individuals, from the observance of ecclesiastical laws which would otherwise be binding on them. Thus practice and theory have introduced a mitigation concerning non-Catholics, as shall be seen under § 2. The legislator, therefore, by emphasizing the term *Catholic Baptism*, doubtless wished to distinguish it from

[82] The "*intentio faciendi id quod facit ecclesia*" is indeed always required, but to interpret it as the intention of the *true* Church cannot be required of non-Catholics, nor may it simply be attributed, as interpretive intention, to the child.

[83] *Trid.*, sess. 7, can. 7 f., *de baptismo*.

other baptisms, otherwise he would have simply said: *Omnes baptizati,* all baptized persons, as in can. 1015 and 1016. But no private interpreter has the right to read the words "in the Catholic Church" into a canon which does not expressly contain it.

(b) "*Ad eam ex haeresi aut schismate conversi,*" those converted to it [the Catholic Church] from heresy or schism. Whilst the former class may be styled original Catholics, this second class is that of *converts.* Conversion is a change from heretical or schismatical belief to the Catholic faith, in the sense of the text. Whether it is brought about by the converts themselves, or by extraneous agencies, is immaterial here. Thus parents may determine the religion of their children as long as these have not attained to the use of reason, and even if they have reached the age of reason, the parents may bring them up as Catholics. Even grandparents may offer their grandchildren for Catholic Baptism, provided they guarantee their Catholic training.[84] However, if children, when they commence to realize the difference between religions, object to embracing the Catholic religion, which the parents would impose on them, there is no conversion to the Catholic faith.[85] Conversion, therefore, either from heresy or schism, must have taken place knowingly or unknowingly, through the medium of parents or tutors, some time before the marriage.

(c) "*Licet sive hi sive illi ab eadem postea defecerint,*" although either these [converts] or those [original Catholics] may afterwards have fallen away. Broadly speaking, apostasy from the Catholic faith does not change, with regard to our canon, the fact of being a Catholic. An apostate is considered a Catholic before the ecclesias-

84 Benedict XIV, "*Postremo mense,*" Feb. 28, 1747, § 17.

85 Wernz, *l. c.,* IV, Vol. I, p. 306.

tical law. We may quote here an answer given by the S. Congregation, to the effect that it does not matter whether one fell away in childhood, or youth, or later, provided he was baptized a Catholic.[86] Therefore *deficere,* to fall away, may be a voluntary or an involuntary act, brought about through the agency of others, just as in the case of conversion. The consequences will be seen in n. 2 and § 2.

(d) This law is binding on such as *contract marriage among themselves.* Therefore if James, a baptized Catholic but fallen away before marriage, wishes to marry Gemma, a Catholic convert, who renounced her religion when she became engaged to him, he has to do it before a Catholic priest and two witnesses, otherwise they are not married according to Catholic law. If it is asked, before what pastor they must marry, the answer is, any pastor may assist validly, and in our case, also licitly, within the limits of his parish.

2.° This paragraph *concerns mixed marriages.* It provides that original Catholics as well as converts are bound by the law if they marry *non-Catholics,* no matter whether the latter be baptized or not. A dispensation from the prohibitive impediment of mixed religion or from the nullifying impediment of disparity of cult does not neutralize this formal requirement. This last clause was not superfluous because confusion had arisen between the two impediments of clandestinity and mixed religion, so that some were led to assume that dispensation from the latter would also include dispensation from the observance of the required form. Surprise may be caused by the omission of the clause appended to IX, § 2 of the "*Ne temere,*" which reads: "Unless the Holy See should have

[86] S. C. C., Feb. 1, 1908: "*defecerunt, etiam in juvenili vel infantili aetate.*"

decreed otherwise for some particular place or province." This refers to the constitution of Pius X, "*Provida,*" of Jan. 18, 1906, given for the German Empire, and only to that, every other decree, even the *Declaratio Benedictina* for the Netherlands (Nov. 4, 1741) being declared null and void.[87] Now the "*Provida*" is also abolished, because the exempting clause is omitted and no reference made to any particular legislation. Therefore also the extension to the Kingdom of *Hungary* made by the Roman Pontiff, Feb. 23, 1909, is no longer in force. There is no longer any favored country concerning this point of matrimonial law.

3.° *Orientals, i. e.,* such persons as belong to the united, not to the schismatic, Church of the Oriental rite (Greek, Syriac, Armenian, Coptic), are not bound to the new form if they contract marriage among themselves, because the Code does not legislate for them.[88] But if an Oriental wishes to contract marriage with a person of the Latin rite, he must conform to the law of the Latin Church and get married before a priest and two witnesses.[89] If an Oriental Catholic should wish to marry a non-Catholic, say an Anglican, he would not be obliged to observe the form. But if the Anglican party had been baptized in the Catholic faith, or converted to it and remained in it after childhood, the Catholic form of marriage would be required.

§ 2. Saving the rule in n. 1, § 1 of this canon, *non-Catholics,* whether baptized or not, *who marry among themselves are nowhere bound to observe the Catholic form of marriage.* Neither are those born of non-Catholic parents and baptized in the Catholic Church, but who have grown up from childhood in heresy or schism or

87 S. C. C., Feb. 1, 1908, ad IV.
88 Can. 1; S. C. C., Feb. 1, 1908, ad I.
89 S. C. C., March 28, 1908, ad II.

infidelity, or without any religion at all, if they marry a non-Catholic party.

The two clauses of this section refer to two classes of contracting parties, the one constituting purely non-Catholics, the other supposing that one of the parties once belonged to the Catholic Church by baptism in the same.

The first category is that of *purely non-Catholics, i. e.,* such as are neither original Catholics nor converts to the Catholic faith. If they were such, or if one of the parties was such, they would fall under § 1, n. 1, and would be bound to observe the form prescribed. But purely non-Catholics, whether baptized or not, if they marry *among themselves,* are not bound by the Catholic form.[90] This is new legislation, as far as its general extent is concerned.[91]

The second clause affects persons born of non-Catholic parents and baptized in the Catholic Church. "*Ab acatholicis nati,*" born of non-Catholics, obviously means that neither the father nor the mother belonged to the Catholic Church. In the case of an illegitimate child it suffices that the mother was not a Catholic, because the father is supposed to be unknown. This may be safely extended to a child born after his father's death.[92] The text supposes that this child was *baptized in the Catholic Church,* and therefore would fall under the ruling of § 1, n. 1. But there is also a second supposition, *viz.,* that the child grew up to the *seventh year* in heresy or schism or infidelity or without any religion at all. The seventh year certainly is a line of demarcation and may be taken as a safe limit, even though signs of malice or indicating the

90 Nov. 4, 1741.

91 The *Declaratio Benedictina* and that of the S. C. C., of Nov. 4, 1741, were only made for the Netherlands.

92 Can. 90.

use of reason may have been manifested. But after the seventh year the use of reason is presumed, and therefore the child is no longer *in infantili aetate,* unless it can be proved that it was destitute of reason after the seventh year.[93] A third supposition is that it grew up either in *heresy, or schism* (Russian, Greek, Jansenist), or *infidelity,* or *without any religion.*[94] This, of course, supposes a heretical, schismatic or irreligious education. If a child has been educated in the Catholic faith before the seventh year was completed, it can not be said to have grown up in a sectarian or irreligious atmosphere, and must therefore be considered a Catholic. The last condition is that a person baptized a Catholic,— but now practically speaking a heretic or schismatic or unbeliever, if he *marries a non-Catholic,* is not bound by the Catholic form.*

In conclusion we draw attention to the *individual character*[95] of the marriage contract which has been a rich source of canonical speculation. For it is the common teaching of canonists that, if one of the parties was exempt from the law of *"Tametsi"* (concerning the Catholic form), the other party also was free in virtue of the individual character of marriage, or rather by reason of a communication of the exemption. This principle is in itself perfectly correct and must be upheld in every bilateral contract. But the supreme legislator is empowered to declare in every single case whether or not such a communication takes place, and in the case of the impediment of clandestinity he has now spoken for the whole world, as Pius X had done in the *"Ne temere,"* in which he exempted the German empire from its observance. The redeeming word has been uttered: in the case of the law

93 Can. 89, § 3.

94 S. O., April 6, 1859 (*Coll. P. F.*, n. 1174).

* See Appendix II to this volume.

95 See *Archiv für K.-R.*, 1900, Vol. LXXX, p. 469 ff.

obliging the observance of the Catholic form, *mixed marriages* are to be contracted like Catholic marriages as far as the mere form is concerned. Therefore, even if the non-Catholic party is not obliged to observe this form, he or she can no longer communicate his or her exemption to the Catholic party.

MARRIAGE RITES

Can. 1100

Extra casum necessitatis in matrimonii celebratione serventur ritus in libris ritualibus ab Ecclesia probatis praescripti aut laudabilibus consuetudinibus recepti.

Outside the case of necessity, the rites prescribed in the liturgical books approved by the Church or received by praiseworthy custom are to be observed.

Wiclif and Huss depreciated the sacred rites of the Church in the administration of the Sacraments and the solemnization of marriage. Therefore those suspected of sharing their errors were asked whether they believed that a Christian contemning those rites was guilty of a grievous sin.[96] This interrogation proves that the Church insists upon the ceremonies with which she has surrounded the celebration of marriage, and that, except in cases of necessity, their omission is a grievous transgression. The rites to be observed are those contained in the *Roman Ritual,* which should be followed everywhere, unless *praiseworthy customs* have introduced a somewhat different one. In South Shantung Chinese bridal couples are excused from joining hands because this custom is repulsive to them.[97] The natives of Pondi-

96 Martin V, "*Inter cunctas,*" Feb. 22, 1418, art. 19 (Denzinger, n. 563).

97 S. O., July 30, 1890 (*Coll. P. F.,* n. 1736).

chery use, instead of a wedding ring, an emblem called *taly,* which custom is admitted by Rome.[98] Note that the text says *praiseworthy customs,* which means that such customs must be reasonable and free from superstition.[99]

THE CATHOLIC MARRIAGE RITE

CAN. 1101

§ 1. Parochus curet ut sponsi benedictionem sollemnem accipiant, quae dari eis potest etiam postquam diu vixerint in matrimonio, sed solum in Missa, servata speciali rubrica et excepto tempore feriato.

§ 2. Sollemnem benedictionem ille tantum sacerdos per se ipse vel per alium dare potest, qui valide et licite matrimonio potest assistere.

§ 1. The pastor should take care that the spouses receive the solemn nuptial blessing, which may be imparted even after they have lived in the matrimonial state for a long time, but only at Mass, according to the special rubrics provided for the purpose, and on days not forbidden.

§ 2. The solemn blessing may be imparted only by the priest or his delegate who is validly and licitly authorized to assist at the marriage.

How seriously the law concerning the nuptial blessing is to be taken may be seen from an instruction of the Holy Office,[1] which says that absolution may be denied to those who refuse to receive that blessing. Surely a great neglect, the same instruction says, is that which spurns the special graces and the spiritual aid attached to

98 S. O., Feb. 3, 1892 (*ib.*, n. 1782); but the priest must substitute: "*tesseram hanc nuptialem.*"

99 S. O., *ib.*

1 S. O., July 6, 1817 (*Coll. P. F.*, n. 725).

these sacred rites. Hence also the grave obligation of the pastor to instruct the people to that effect.

This blessing may also be *imparted to a couple that never received it,* no matter how long the parties have lived in the married state. But in such a case the one who blesses such a validly married couple must tell them that this blessing has nothing to do with the validity of their marriage and must not require a renewal of the marital consent. Hence the question: Wilt thou take, etc., and the "*Ego coniungo vos, etc.,* must be omitted.[2] During the forbidden seasons of Advent and Lent this blessing must not be bestowed on a couple already married.

As to § 2 the law establishes nothing new, but draws the consequence from the regulations made concerning valid and licit assistance, and extends it to the blessing to be imparted to a couple already married.

It may not be superfluous to state the *liturgical rules* for the celebration of marriage.

1. *The Ritual or Private Blessing.*[3] The priest asks the consent of both parties: N. wilt thou take N. here present, etc., to which both answer: I will. Then the priest says: *Ego coniungo vos,* etc., after which follows the blessing of the ring. The bridegroom puts the ring on the finger of the left hand of the bride. Then the priest blesses the couple: *Confirma hoc,* etc. This is all that belongs to the Ritual Blessing. This would be the form for Catholic marriages during the forbidden seasons or outside the nuptial mass. However, since, according to can. 1108, the bishop may permit the solemn blessing even during the "holy" seasons, we will now see what this is.

2 S. O., Jan. 15, 1784; S. C. P. F., 21, 1841 (*Coll. cit.,* nn. 566, 932).

3 Cfr. *Rituale Rom.,* tit. VII, c. 2 (Ed. Pustet, 1913, p. 214 f.).

2. *The Solemn Blessing*[4] comprises (a) the Ritual Blessing just described, to be imparted by the priest vested for holy Mass, except the Maniple, which he assumes after the blessing. (b) The *Nuptial Mass,*[5] either that *Pro Sponso et Sponsa,* or a Mass of the day. The *Missa Pro Sponso et Sponsa* is a Votive Mass and must therefore be said without the *Gloria* and *Credo* and with *Benedicamus* at the end. This must also be observed when the Mass is solemnly sung, and no contrary custom may be tolerated.[6] The second or third oration must be added according to the rubrics for the respective day. This Mass also contains two prayers for the spouses, one after the *Pater Noster* (*"Propitiare"*), the other before the *"Placeat,"* both to be said by the priest facing the couple. This Mass may be said on all days not prohibited by the rubrics. The rubrics *forbid* this *Votive Mass* on the following days: all Sundays and holydays of obligation, all holydays of the first and second class within the octaves of Epiphany, Easter, Pentecost, and Corpus Christi, all privileged vigils and ferial days, excluding feasts of the 1st and 2nd class.[7]

On these forbidden days the Mass of the day (*de festo vel die occurrente*) must be said. However, the orations taken from the formulary of the Mass *Pro Sponso et Sponsa* must be inserted after the *oratio diei* and other orations, if such are prescribed in the Ordo, but before the *imperata.* On holydays like Epiphany, Trinity Sunday, Corpus Christi, or others which exclude any other orations, the *Oratio Pro Sponso et Sponsa* is to be added

4 Cfr. Wapelhorst, *Compendium S. Liturgiae,* 1915, p. 485 f.

5 S. Rit. C., March 3, 1818 (*Coll. P. F.,* n. 728).

6 S. Rit. C., Aug. 31, 1839 (*ib.,* n. 890).

7 S. Rit. C., June 14, 1918 (*A. Ap. S.,* X, 332). Vigils are the days preceding Epiphany, Pentecost, Christmas; the privileged ferial days are Ash Wednesday and Holy Week.

sub *unica conclusione*.[8] If the bishop, according to can. 1108, permits solemn celebration during the forbidden time, even on Christmas or Easter, the same orations, *sub unica conclusione,* must be added to the oration or orations of the day. And whenever the orations *Pro Sponso et Sponsa* are said, the special orations after the "*Pater Noster*" and before the "*Placeat*" must also be recited.

We add from a decision of the Holy Office[9] the following points: When several couples are to be blessed, which is permitted, the officiating priest must ask the consent of each couple separately and say over each separately the words: "*Ego vos coniungo.*" He may bless all the rings simultaneously and also recite the prayers in the plural form. He is not obliged to apply the Mass for the parties unless he has received a stipend.[10] In "black" Masses no nuptial blessing is to be given. The same priest who has given the blessing must sprinkle the parties kneeling at the altar, but the pastor may receive the marriage consent according to the Ritual, and another priest may, with the pastor's or the Ordinary's permission, impart the nuptial blessing, *i. e.,* say the nuptial Mass.

CEREMONY FOR MIXED MARRIAGES

CAN. 1102

§ 1. In matrimoniis inter partem catholicam et partem acatholicam interrogationes de consensu fieri debent secundum praescriptum can. 1095, § 1, n. 3.

§ 2. Sed omnes sacri ritus prohibentur; quod si ex hac prohibitione graviora mala praevideantur, Ordina-

8 *Ibid.*

9 Sept. 1, 1841 (*Coll. P. F.,* n. 938).

10 Of course he may receive only one stipend, but stole fees from each couple.

rius potest aliquam ex consuetis ecclesiasticis caeremoniis, exclusa semper Missae celebratione, permittere.

In marriages between Catholics and non-Catholics, the consent must be asked as prescribed under can. 1095, § 1, n. 3. All sacred rites are prohibited. If, however, greater evils should be foreseen from this prohibition, the Ordinary may permit one or the other of the usual ecclesiastical ceremonies, always exclusive of the nuptial Mass.

The first clause admits the so-called *passive assistance,* sometimes also styled "bare, simple, and material assistance."[11] Strictly speaking, this does not even include the words: *"Ego vos coniungo,"* etc.[12] However, since the Code requires that the consent be asked and received, it stands to reason that the term passive assistance must here be taken with a grain of salt. The question addressed to both parties separately: "Wilt thou, etc.?" cannot be omitted. After both have given their consent, they join hands and recite severally the formula, "I, N. N., etc." Thereupon the priest may say: "By the authority committed to me, I pronounce you united in the bonds of matrimony." Then the bridegroom puts the ring on the finger of the left hand of the bride, saying: "With this ring I thee wed, and plight unto thee my troth."[13] A brief sermon or exhortation before and after the ceremony is permitted if the bishop or custom allows it.[14] Of course, the priest may not wear surplice and stole, but only the black cassock.[15]

The *second clause* admits the Ritual Blessing in cases

11 S. C. P. F., Sept. 6, 1785 (*Coll.*, n. 579).

12 S. O., Aug. 1, 1821 (*Coll. cit.*, n. 762).

13 See *Excerpta ex Rituali Romano,* ed. 14, p. 243.

14 S. O., July 16, 1885 (*Coll. cit.*, n. 1638).

15 *Ibid.* A surplice is permitted if the parties demand some ornamental dress; S. O., Dec. 9, 1874 (*Coll. cit.*, n. 1427).

where the Ordinary thinks it necessary in order to avoid greater evils, as the Instruction of the Secretary of State, Nov. 15, 1858, says. These *greater evils* are described in a letter of the Holy Office, Nov. 26, 1862, as follows:

(1.) If the refusal of said assistance would give rise to complaints and animosity on the part of non-Catholics against the faithful and the laws of the Church;

(2.) If the contracting parties would otherwise go to a non-Catholic minister or church, either before or after the marriage;

(3.) If there were reason to fear that the promises made at mixed marriages would remain unfulfilled.[16]

This enumeration must not be looked upon as exhaustive, but peculiar circumstances should be taken into consideration by the Ordinary, who is the judge as to the existence of probable evils. Only one rule is added in the last-named instruction, *viz.*: that Ordinaries should not give the permission at random and indiscriminately, nor proclaim it as a rule, but make prudent and cautious use of their power.

The *nuptial Mass* is *always excluded,* even in cases where the Blessing of the Ritual is permitted. From this rule the Roman Court has never departed. When asked[17] whether a private Mass could be said after the marriage in the presence of the bridal couple and their suite, even though the spouses would not occupy prominent seats thereat, the Holy Office answered negatively, if any suspicion could arise that the Mass would be regarded as part of the marriage ceremnoy. Of course, if the couple wishes to assist privately at a Mass said after the marriage, no one can hinder them.[18]

16 *Coll. P. F.*, n. 1169; S. O., Jan. 3, 1871 (*Coll.*, n. 1632).

17 S. O., Jan. 17, 1872.

18 The priest may even receive a stipend from the couple for that mass, but it would be imprudent to announce the fact.

RECORDING MARRIAGES

CAN. 1103

§ 1. Celebrato matrimonio, parochus vel qui eius vices gerit, quamprimum describat in libro matrimoniorum nomina coniugum ac testium, locum et diem celebrati matrimonii atque alia secundum modum in libris ritualibus et a proprio Ordinario praescriptum; idque licet alius sacerdos vel a se vel ab Ordinario delegatus matrimonio adstiterit.

§ 2. Praeterea, ad normam can. 470, § 2, parochus in libro quoque baptizatorum adnotet coniugem tali die in sua paroecia matrimonium contraxisse. Quod si coniux alibi baptizatus fuerit, matrimonii parochus notitiam initi contractus ad parochum baptismi sive per se sive per Curiam episcopalem transmittat, ut matrimonium in baptizatorum librum referatur.

§ 3. Quoties matrimonium ad normam can. 1098 contrahitur, sacerdos, si eidem adstiterit, secus testes tenentur in solidum cum contrahentibus curare ut initum coniugium in praescriptis libris quamprimum adnotetur.

1. As soon as possible after the marriage ceremony the pastor, or whoever takes his place, shall enter in the marriage register the names of the parties and witnesses, the place and date of the marriage, as well as other data prescribed by the rituals or diocesan statutes; and this he must do even though another priest delegated by himself or the Ordinary assisted at the marriage.

The *person* who is obliged to record marriages is the *pastor,* because rights and duties are correlative; since the pastor is entitled to assist at, he is also obliged to record, marriages.

If the pastor has a *substitute*, either temporary or permanent (assistant), the latter is likewise obliged to see to it that marriages are properly recorded. If the substitute has assisted at a marriage and records the same himself, he has to sign his own name.

If a priest was *delegated* either by the pastor or by the Ordinary, or subdelegated, if we may say so, by the assistant, it is not the delegate who must record the marriage, but the pastor or his substitute. However, the priest who has actually assisted must be named in the record. It may be added that the pastor is to be held responsible for the proper recording of marriages, though in single instances he may leave this duty to an assistant. The *time* within which the marriage must be recorded is *quamprimum*,[19] as soon as possible after the ceremony has taken place, in order to avoid the evil consequences of forgetfulness. We do not wish to set a definite time limit, as much depends upon habit and a "good memory," but the obligation is called a serious one (*gravis*) by Cardinal Gennari.[20]

The *matter* to be recorded is: the names of the couple and of the witnesses, the place and date of the marriage, mention of the dispensation if one was used, and the fact of delegation if the assisting priest was delegated by another.

It may be added that the Code mentions a *liber matrimoniorum*, thereby discouraging the custom of employing loose leaves. The form to be used in recording marriages is given in the *Rituale Romanum*.[21]

2. As noted in can. 470, § 2, the pastor shall enter every marriage contracted in his parish also in the *baptismal*

19 The "*Ne temere*," IX, § 1, had *statim*, immediately, which commentators interpreted as one day, or at most three days.

20 *Breve Commento*, ed. 6, p. 43.

21 Tit. X, c. 5 (ed. Pustet, 1913, p. 330 f.).

record. If the parties, or one of them, were baptized elsewhere, the pastor in whose parish the wedding was celebrated shall either himself or through the episcopal chancery inform the pastor of the parish where the party or parties were baptized of the fact of the marriage, that the latter may register it in *his* baptismal record. "Red tape," some will say; but this contempt is not shared by a *defensor vinculi* or any one who has ever had to do with a matrimonial court. Rome will hardly recede from this prescription, though petitions asking for a modification are not wanting.[22] The Congregation that refused such petitions insisted that the record to be sent to the pastor of the parish of baptism should comprise the names of the contracting parties, the full [23] names of their parents, the age of bride and groom, the place and date of the marriage, and the full names of the witnesses, to be followed by the signature of the pastor and the parochial seal.[24] This document, thus signed and sealed by the pastor, may be sent to the episcopal chancery of the diocese in which the marriage took place. If it is sent thither, the pastor is free from further obligation or responsibility. The decree just mentioned enjoins Ordinaries to see to it that these regulations are conscientiously carried out, even if they should be compelled to make use of canonical penalties.

3. Whenever a marriage is contracted according to can. 1098, the priest who was present, or, if no priest was present, the lay witnesses, are bound conjointly with the contracting parties to take care that the marriage be recorded as soon as possible in the parish register.

22 S. C. Sacr., March 13, 1910, ad IX.

23 "Full" means the baptismal or first name, *v. g.*, John, and the family name, *v. g.*, Murphy; *agnomen* properly signifies the surname or an adopted name.

24 S. C. Sacr., March 6, 1911 (*A. Ap. S.*, III, 102 f.).

The canon quoted (1098) speaks of the extraordinary case where there is danger of death and the pastor cannot perform the marriage. If a priest was present, he is bound equally with the contracting parties to see to it that the marriage is recorded. If no priest was present, the obligation is shared equally by the lay witnesses and the contracting parties; that is to say, if the parties themselves have the marriage recorded, the witnesses are free; but until the record is actually made, none of them is exempt from the obligation.

The notice should be sent to the pastor who was entitled to assist at the marriage, but it may also be sent to the diocesan chancellor, who shall forward it to the pastor.

CHAPTER VII

MARRIAGE OF CONSCIENCE

Can. 1104

Nonnisi ex gravissima et urgentissima causa et ab ipso loci Ordinario, excluso Vicario Generali sine speciali mandato, permitti potest ut *matrimonium conscientiae* ineatur, idest matrimonium celebretur omissis denuntiationibus et secreto, ad normam canonum qui sequuntur.

Can. 1105

Permissio celebrationis matrimonii conscientiae secumfert promissionem et gravem obligationem secreti servandi ex parte sacerdotis assistentis, testium, Ordinarii eiusque successorum, et etiam alterius coniugis, altero non consentiente divulgationi.

Can. 1106

Huius promissionis obligatio ex parte Ordinarii non extenditur ad casum quo vel aliquod scandalum aut gravis erga matrimonii sanctitatem iniuria ex secreti observantia immineat, vel parentes non curent filios ex tali matrimonio susceptos baptizari aut eos baptizandos curent falsis expressis nominibus, quin interim Ordinario intra triginta dies notitiam prolis susceptae et baptizatae cum sincera indicatione parentum praebeant, vel christianam liberorum educationem negligant.

Can. 1107

Matrimonium conscientiae non est adnotandum in consueto matrimoniorum ac baptizatorum libro, sed in peculiari libro servando in secreto Curiae archivo de quo in can. 379.

It is evident from these canons that a "marriage of conscience" is not the same as a clandestine marriage, although it may be called, as the *Summa Godfredi* says,[1] a sort of clandestine contract because it is contracted without any solemnities. In France, clandestine marriages were those which, though according to the Tridentine form, were contracted without the consent of the parents. To these refers the Constitution of Benedict XIV, "*Satis vobis,*" Nov. 17, 1741, which is the chief source of our Code in this matter.

A "marriage of conscience" is one contracted without the publication of the banns and in secret, but not without the formalities prescribed by the Church. The following canons plainly show that a priest and witnesses are supposed to be present. The Code says that no one but the *Ordinary* of the diocese, or his vicar-general if he has received a special commission *ad hoc* from the bishop, may *permit* such a marriage, for most *weighty and urgent reasons* only. Such reasons may be the following: if two live together unsuspectedly as married though they were never married;[2] if the civil law imposes conditions injurious to the freedom of marriage, if the civil power interferes with the liberty, *e. g.,* of soldiers, or if disgrace and discord would be likely to follow from iniquitous laws impeding marriage.[3] There may be, as Benedict

1 Cf. Esmein, *l. c.,* p. 182.

2 "*Satis vobis,*" § 6: "*in figura matrimonii degentes,*" really, in concubinage.

3 *Instructio S. C. P. F.,* 1758 (*Coll.,* n. 571). This was the case in Curaçao, where the Dutch Governor imposed a penalty of 5c

XIV says, other reasons, but whatever they are, they must be very grave and serious in order to outweigh the great evils resulting from secret marriages. These evils are: easy divorce, danger of concubinage and polygamy, spiritual and temporal ruin of the offspring.[4]

Can. 1105 describes the *pledge of secrecy* thus: the permission for such a marriage implies a promise and the strict obligation of secrecy on the part of the assisting priest, of the witnesses, of the Ordinary and his successors, as well as on the part of the one contracting party, as long as the other will not consent to the divulgation of the marriage. It would be safest to put all these parties, with the exception of the Ordinary, under oath. As to the contracting parties themselves, it is evident that both must consent, because marriage is a bilateral contract.

Can. 1106 *relieves the Ordinary of the obligation* of secrecy in two cases: if secrecy would cause scandal or grave injury to the sanctity of marriage, or if the spiritual ruin of the children were threatened. The first condition would be present if the community had become aware of the fact that no public marriage had taken place between the parties. The sanctity of marriage would be imperilled if infidelity to the marriage vows or divorce would ensue. The children's welfare would suffer if the parents would not have them baptized, or if they had them baptized under fictitious names, because in the latter case the children's legitimacy and their right to inherit the property of their parents would be jeopardized. Therefore the parents are obliged, and should promise in writing, to send to the Ordinary, within thirty days, notice

florins for marrying before a pastor. Cfr. Leo XIII, "*Il divisamento*," Feb. 8, 1893.

4 "*Satis vobis*," § 2 f.

of the birth of a child and of its baptism. The parents may use fictitious names, says Benedict XIV, if only the Ordinary is informed that the child is verily theirs, that it is legitimate, and has been baptized.[5] Finally the Ordinary is not obliged to secrecy if the parents neglect the Christian education of their children.

Can. 1107 enjoins *distinct and secret recording.* A marriage of conscience should never be entered in the regular marriage records nor should note be made thereof in the common baptismal record, but in a special book which must be kept in the secret archives of the diocesan court, mentioned in can. 379. It should be a sealed book, to be opened only when another such marriage is to be recorded.[6] This suffices to show the seriousness with which the legislator wishes to see matters of this kind treated. For the rest, where civil marriage is prescribed, "marriages of conscience" will be rare.

5 "*Satis vobis,*" § 11. 6 *Ibid,* § 10.

CHAPTER VIII

TIME AND PLACE OF MARRIAGE CEREMONIES

CAN. 1108

THE TIME

§ 1. Matrimonium quolibet anni tempore contrahi potest.

§ 2. Sollemnis tantum nuptiarum benedictio vetatur a prima dominica Adventus usque ad diem Nativitatis Domini inclusive, et a feria IV Cinerum usque ad dominicam Paschatis inclusive.

§ 3. Ordinarii tamen locorum possunt, salvis legibus liturgicis, etiam praedictis temporibus eam permittere ex iusta causa, monitis sponsis ut a nimia pompa abstineant.

1. Marriages may be contracted at any time of the year. This, says Clement III, was the custom of the Roman Church. However, taking marriage as a solemn nuptial contract, says the same Pontiff, it is customary that from Septuagesima Sunday to the Octave of Pentecost such a *solemnity* be not performed.[1] Add to this period the time of Advent, and the former forbidden times are described. But, as the same Pope says, the mere matrimonial *contract* (*consensu interveniente legitime de praesenti*) may be entered into at any time.

2. *Section two* says that the solemn nuptial blessing

1 C. 4, X, II, 9, *de feriis;* cfr. Bern. Pap., *l. c.*, p. 303; Tancred, *l. c.*, p. 69.

may not be imparted from the first Sunday of Advent to Christmas, inclusive, and from Ash Wednesday to Easter Sunday, inclusive.[2]

3. However, *the bishops* may, for good reasons, permit solemn weddings even during the forbidden seasons, provided the liturgical rules be observed and the parties admonished to refrain from too great pomp. Whether the reasons are sufficient the bishop must judge.[3] A sufficient reason would be if the pastor visits a mission only at rare intervals or the couple lives at a great distance from church;[4] also the sudden departure of a soldier for the barracks or battlefield. The Code is very moderate and benign in this matter, which is evident also from the fact that forbidden times no longer figure among the prohibitive impediments. But if the Church is condescending, she expects the faithful to make proper use of her kindness, and hence the parties should be admonished to refrain from too much pomp, which would not be in keeping with the spirit of the season. Thus noisy banquets, balls or dances would hardly be permissible. Formerly the *traductio sponsae pomposa,* the solemn induction of the bride into the home of the bridegroom, was also forbidden;[5] but now-a-days such a pompous ceremony with pipers and singers and a choir of boys and girls is no longer customary, except in Slavic countries.

2 Formerly from the first Sunday of Advent to Epiphany (Jan. 6), and from Ash Wednesday to Low Sunday; cfr. *Trid.*, sess. 24, c. 10, *de ref. mat.*

3 S. C. P. F., June 31, 1796 (*Coll.*, n. 631).

4 *Ibid.*

5 Cfr. cc. 2, 3, 5, C. 33, q. 4; the consummation of marriage was also forbidden; cfr. Tancred, p. 69.

THE PLACE

CAN. 1109

§ 1. Matrimonium inter Catholicos celebretur in ecclesia paroeciali; in alia autem ecclesia vel oratorio sive publico sive semi-publico, nonnisi de licentia Ordinarii loci vel parochi celebrari poterit.

§ 2. Matrimonium in aedibus privatis celebrari Ordinarii locorum in extraordinario tantum aliquo casu et accedente semper iusta ac rationabili causa permittere possunt; sed in ecclesiis vel oratoriis sive Seminarii sive religiosarum, Ordinarii id ne permittant, nisi urgente necessitate, ac opportunis adhibitis cautelis.

§ 3. Matrimonia vero inter partem catholicam et partem acatholicam extra ecclesiam celebrentur; quod si Ordinarius prudenter iudicet id servari non posse quin graviora oriantur mala, prudenti eius arbitrio committitur hac super re dispensare, firmo tamen praescripto can. 1102, § 2.

1. All *marriages between Catholics should be celebrated in the parish church.* If another church or oratory, either public or semi-public, is preferred, the permission of the Ordinary or pastor should be obtained. Although the bishops might insert the first clause of this text in their diocesan or provincial statutes, it would be wiser to follow the example of the second Provincial Council of St. Louis (1868), which enjoins pastors to *exhort* the faithful to get married in church.[6] For the common law grants the faithful the right of petitioning the pastor to marry outside the parish church. Therefore the whole canon would have to be inserted in the statutes. But the cele-

6 Wernz, *l. c.*, IV, Vol. I, p. 276, n. 183, is very rigorous on this point, but probably he would now modify his view; *Coll. Lac.*, III, 319, n. 11.

bration of marriage outside the parish church is permitted only in churches and public or semi-public oratories situated within the limits of the parish in which the pastor can licitly and validly assist. Of course, unless the pastor would be subject to the rector of the church or oratory who would possess full parochial power, the marriage would have to be performed by the competent pastor or his delegate. Note that *either* the Ordinary *or* the pastor may grant permission.

2. § 2 limits the power of granting permission to the *Ordinary* of the diocese, if in some extraordinary case there be a just and plausible reason for allowing a marriage to be celebrated in a *private house.* Such a reason would be illness or any "praiseworthy reason," for instance, if a benefactor of the diocese or parish has a private chapel in his home, the bishop or his vicar-general, but not the pastor, may grant permission. In such cases the nuptial Mass may be said in a private chapel according to the rubrics.[7]

In *churches or oratories of seminaries or of women religious* the Ordinary should not grant permission for marriages to be celebrated, except in cases of urgent necessity, and then only with proper precautions. What these precautions are may be surmised. The religious should not be disturbed in their discipline, and the seminarians should suffer no disturbance, and hence neither religious women nor seminarians should be allowed indiscriminately to witness the marriage ceremony.

3. *Marriages between Catholics and non-Catholics are to be performed outside the church.* However, should the Ordinary in his discretion be convinced that evil might follow from the observance of this law, he may dispense

7 S. Rit. C., Aug. 31, 1872 (*Decreta Auth.*, n. 3265): where there is no chapel, an altar should be erected if Mass is to be said.

from it, provided can. 1102, § 2, be strictly observed.

"*Extra ecclesiam,*" outside the church, means outside the body of the Church, but does not exclude the sacristy, in which, therefore, a mixed marriage may be celebrated.[8] As a general rule such marriages are performed in the rectory, and this custom is not only safe but very proper. For the rest we refer to can. 1102, which describes the "greater evils."

The reasons why the Church treats mixed marriages so severely are stated in an Instruction of the Secretariate of State, 1858, which says that Catholics should never forget that the Church abhors such marriages and never ceases to deter the faithful from them because they are injurious to the salvation of the contracting parties themselves as well as of their offspring.

8 S. O., Jan. 17, 1877, quoted by De Smet (*l. c.*, p. 346). This decision, besides the sacristy, also admits a chapel in the church, without the candles lighted or any special adornments.

CHAPTER IX

THE EFFECTS OF MARRIAGE

CAN. 1110

Ex valido matrimonio enascitur inter coniuges vinculum natura sua perpetuum et exclusivum; matrimonium praeterea christianum coniugibus non ponentibus obicem gratiam confert.

Valid marriage unites the contracting parties by a bond which is of its very nature perpetual and exclusive; Christian matrimony moreover imparts sacramental grace to husband and wife if they place no obstacle in its way.

After what has been said under can. 1002, no further explanation is needed. The marital contract, or *matrimonium in fieri,* is the consent duly given according to the form prescribed by the Church. This contract produces certain natural effects, *viz.: indissolubility* and *unity*. These two innate qualities, if we may so call them, are attached to *every valid marriage,* not only to a union between Christians,[1] though they receive additional dignity and firmness from the fact that Christian matrimony has been raised to the dignity of a *sacrament.* Therefore also Christian marriage has a *special grace* attached to it, which attends every Christian marriage, provided the contracting parties are in the state of sanctifying grace. If they are not in the state of grace at the moment they give the marital consent, the sacra-

1 Leo XIII, "*Arcanum,*" Feb. 10, 1880

mental grace is conferred as soon as the obstacle is removed, because the bond is lasting (*vinculum perdurans*). It is, therefore, advisable and greatly to be recommended that the parties make a good confession before marriage, although there is neither a divine nor an ecclesiastical law that enforces this pious practice.[2]

MUTUAL RIGHTS AND DUTIES

CAN. 1111

Utrique coniugi ab ipso matrimonio initio aequum ius et officium est quod attinet ad actus proprios coniugalis vitae.

Husband and wife, from the moment when the marriage is contracted, have equal rights and duties concerning the acts pertaining to the conjugal life.

This follows from the *primary end* or purpose of marriage, which is the propagation of the human race and the education of offspring. To this end, as stated under can. 1013, the two other purposes of matrimony, mutual aid and the allaying of concupiscence, are subordinate.

This primary end, however, cannot be obtained without conjugal intercourse (*debitum coniugale*). Hence to the right of demanding that *debitum* there must necessarily correspond the obligation of rendering it. And since marriage is a bilateral contract, right and obligation are equal in both parties.[3] It may, of course, happen that one party is deprived of the right of demanding the *debitum;* in that case the other is not obliged to render it. Two cases are mentioned which may suspend or take away the right of demanding the *debitum:* vow and adultery.

2 Cfr. De Smet, *l. c.*, pp. 137 f.

3 Cfr. I Cor. 7, 3; c. 24, C. 217, q. 2; c. 3, 4, C. 32, q. 2 (these texts rather savor of rigorism).

The *vow* here understood is one which would render the marriage illicit. Hence two vows only of those mentioned in can. 1058 refer to the *debitum, viz.:* the vow of virginity and that of perfect chastity.[4] Concerning the *vow of virginity* it must be said that the party obliged by it is not allowed to demand the *debitum,* but is bound to render it, unless he or she has lost that right. But after the consummation of the marriage by the conjugal act, the object of this vow is completely gone, and therefore the party formerly bound by the vow may after consummation also *demand* the *debitum.*

As to the *vow of perfect chastity,* the party bound by it is not allowed to *demand* the *debitum,* but is obliged to *render* it as long as the other party has not forfeited that right. Therefore this vow, unless dispensed from, lasts throughout marriage, but the right to the *copula* is not radically taken away by it, nor on the other hand is the right of the party not bound by the vow affected, so that the party bound by the vow may licitly render the *debitum.*

It may happen that one wishes to make a *vow of chastity after marriage has been contracted and consummated,*—perhaps for a number of years. Such a vow may only be made in two cases: (a) if the other party consents or (b) has forever lost the right of demanding the *debitum.* Concerning (a) note that no vow made by fraud, compulsion or threat, or in a state of melancholic depression, can take away the right to conjugal intercourse.[5] Mutual consent alone can render such a vow lawful and valid. (b) The right of demanding the *debi-*

4 The vow of celibacy does not pertain to the subject, because, after one is married, it practically ceases and has no influence on the conjugal rights.

5 Cfr. cc. 1, 3, 8, 17, X, III, 32.

tum is forfeited by *adultery*,[6] as commonly understood, not by "spiritual adultery," such as heresy or apostasy, which have been stretched by some authors[7] as incurring this penalty. Note that adultery, whether incestuous or simple, entails the loss of the marital right only after judicial sentence of separation has been rendered.[8] This is very reasonable, because otherwise one party might suffer from hallucinations on the part of the other. As the ecclesiastical judge renders the sentence, so he is also entitled to restore the right to the *debitum*. From the vow of perfect and perpetual chastity, however, the Apostolic See alone can dispense.[9] If the vow was public, the S. C. of the Sacraments is the competent authority; if it was secret, the S. Poenitentiaria. Since the faculties granted by the latter to *our bishops* are not abolished, they may be made use of until further decisions.[10] The vow of virginity is not reserved.

If any *doubt* exists concerning the *validity of a marriage*, the party who is certain of the existence of an invalidating impediment is not allowed to *ask* the *debitum*, but must *render* it to the party who is not aware of the obstacle. If, however, the doubt has little probability and rather amounts to a scruple, the first-mentioned party may not only *render*, but also *demand*, the *debitum*.[11]

A juridical question may arise from the texts of the Decretals[12] which command a party to render the *debitum* to the other party when afflicted by leprosy or some

6 All the texts of the Decree and Decretals (c. 9, X, IV, 1) refer to the *fornicationis causa*.

7 Cfr. De Smet, *l. c.*, p. 166, note 5.

8 C. 2, X, II, 16; what we state above is based upon a careful collation of all the texts.

9 Can. 1309.

10 S. C. Conc., April 25, 1918.

11 Cfr. c. 2, X, IV, 21; c. 44, X, V, 39.

12 Cfr. cc. 1, 2, X, IV, 8, quoted by Card. Gasparri.

other serious or contagious disease. Is this law binding on the party not afflicted with such disease? The Decretals would seem to imply that it is, but modern theologians and canonists [13] take the negative view. It must be added, however, that, though this latter opinion may safely be followed in the court of conscience, the strict right cannot be denied, and the texts quoted prove how rigorously mutual right and duty must be taken. But the case of actual drunkenness must be excepted, because such a state is neither, properly speaking, human, nor fit for a human act like the *debitum,* and, besides, may prove injurious to offspring.

With regard to the *mode of performing the debitum* we only add that it must correspond with the primary end of marriage. Husband and wife are, *per se,* allowed the *copula* only for the purpose of bringing forth children. Yet this purpose need not be exclusively and positively held in view. It is sufficient that it be not positively excluded. Hence married persons need not trouble themselves with scruples as to the right intention, as long as they do not employ unlawful means to prevent conception and perform the marital act in accordance with the laws of nature. The conjugal relation finally requires that the spouses live together in a *common home,* unless there are reasons excusing them from this obligation; [14] on which see chapter X.

13 De Smet, *l. c.,* p. 171.

14 Cfr. c. 8, X, II, 13; c. 9, X, IV, 1; cc. 1, 2, X, IV, 8 — from which we must conclude that a long and unjustified absence of one party from home is a violation of the rights of the other.

RIGHTS OF THE WIFE

CAN. 1112

Nisi iure speciali aliud cautum sit, uxor, circa canonicos effectus, particeps efficitur status mariti.

Unless otherwise provided by special laws, the wife partakes of the state of her husband as far as canonical effects are concerned.

Since the wife becomes not the slave or handmaid of her husband, but his consort, companion, and helpmate, it is but natural that she should share his canonical status. This is practically expressed by the *domicile,* which she has in common with her husband, as long as no separation has taken place.[15] Besides, she may follow the *rite* or liturgical worship of her husband [16] and choose her burial place; if she does not select a special place (vault, family-grave), she is to be buried in the cemetery of her husband; in case she has had several husbands, the last one's burial place is also hers.[17] Concerning titles of rank, nobility or honor, the Church leaves it to civil law to determine the wife's status, though she rather favors equality.[18] Of special regulations of the Church as to different rights we know nothing.

But the Church does maintain the perfectly natural theory that the wife is subject to her husband [19] in lawful matters, and even grants him the power of paternal correction, to be exercised, however, with moderation, which excludes violence.[20] The old English law permitted a husband to scourge or whip his errant wife.[21] The hus-

15 Can. 93; c. 3, C. 13, q. 2; c. 4, C. 34, q. 1 et 2.

16 Can. 98, § 4.

17 C. 3, § 1, 6°, III, 12.

18 C. 12, C. 32, q. 2; c. 1, X, IV, 1.

19 I Cor. 11, 3; Eph. 5, 22; Col. 3, 18; c. 12–16, C. 33, q. 5.

20 Cc. 6, 10, C. 33, q. 2 (which permits a fast to be dictated).

21 Blackstone-Cooley, *Comment.,* I, 444.

band may also nullify private *vows* of his wife which interfere with his own lawful rights, as St. Augustine says.[22] Of course this must be understood of private vows which are not reserved, as vows of abstinence, pilgrimages or devotions which would interfere with household or marital duties.[23]

The husband has the duty of providing his wife with the necessaries of life, which the civil law further details.[24] From this it may be seen how the Church stands with regard to the "emancipation" of women.

DUTIES OF PARENTS TOWARDS THEIR CHILDREN

Can. 1113

Parentes gravissima obligatione tenentur prolis educationem tum religiosam et moralem, tum physicam et civilem pro viribus curandi, et etiam temporali eorum bono providendi.

Parents are under the gravest kind of obligation to provide to the best of their ability for the religious and moral as well as the physical and civil education of their children, and for their temporal well-being.

This law, natural as it is, is based upon the fact that not only the procreation, but also the education of children belongs to the primary end of marriage. That the *religious* part is named first should not cause surprise in a Code of ecclesiastical laws. First comes Baptism and then instruction in Christian doctrine. The *moral* education must tend towards the formation of a firm and upright character by word and example. The *physical* education begins in the mother's womb and must be con-

22 C. 16, C. 33, q. 5.
23 Gratian, ad c. 20, C. 33, q. 5.
24 Blackstone-Cooley, *l. c.*, I, 442.

tinued throughout the stages of childhood and youth.[25] The *civil* training consists in teaching the children civic and social virtues, especially obedience to authority, justice, honesty, and patriotism.[26] *Political* knowledge may be reserved for later years and should be directed chiefly to teaching youth to abhor crookedness and graft, which corrode our body politic. We need not here recall the serious instruction of the Holy Office of Nov. 24, 1875, to the bishops of United States in the matter of public schools, of which the title on schools will offer a better opportunity to speak.

LEGITIMACY OF CHILDREN

CAN. 1114

Legitimi sunt filii concepti aut nati ex matrimonio valido vel putativo, nisi parentibus ob solemnem professionem religiosam vel susceptum ordinem sacrum prohibitus tempore conceptionis fuerit usus matrimonii antea contracti.

CAN. 1115

§ 1. Pater is est quem iustae nuptiae demonstrant, nisi evidentibus argumentis contrarium probetur.

§ 2. Legitimi praesumuntur filii qui nati sunt saltem post sex menses a die celebrati matrimonii, vel intra decem menses a die dissolutae vitae coniugalis.

The four canons 1114–1117 are intimately connected, the first two describing the signs of legitimacy by wedlock

25 Sound and moderate physical culture and a little more Spartan-like education would inure our children to hardships and toil, and the cultivation of the social life in the farming districts might prevent the flight to the cities.

26 Cfr. Leo XIII, *"Arcanum,"* 1880; *"Humanum genus,"* 1884; *"Sapientiae christianae"*; *"Rerum novarum,"* 1891; *"Graves de communi,* 1901.

and marriage, the other two concerning legitimation. Taking marriage as the lawful basis and principle, *can. 1114* states that "those children are legitimate who are conceived or born in valid or putative wedlock." This law favors the offspring, for it supposes that a child may be conceived out of lawful wedlock, and yet be legitimate if his parents were married at the time of his birth. But legitimacy always requires a *marriage,* whether certainly or putatively valid. A marriage is certainly *valid* if contracted without an invalidating impediment and according to the form prescribed by the Church. A *putatively valid marriage* is one contracted with due observance of the prescribed form, but with an invalidating impediment, the existence of which is unknown to one of the parties. This case, of course, occurred more frequently, the more impediments were set up in course of time. Hence it was found necessary, since the time of Magister Rolandus,[27] to regard the offspring of such invalid marriages as legitimate. But *good faith* is strictly required,[28] and is assumed until sentence against the validity is given by competent authority. Hence children born out of such wedlock would be held legitimate even if the ecclesiastical court would afterwards annul the marriage.[29]

This holds true concerning any ecclesiastical impediment except clandestinity.[30] But there are two further *exceptions* made in our canon: (a) if one with *solemn religious vows,* before taking those vows,[31] contracts a valid marriage and proceeds to consummate the same, the

27 *Summa Magistri Rolandi,* ed. Thaner, p. 231 f.

28 *Ignorantia affectata* would not be an excuse; c. 10, X, IV, 17.

29 Cc. 2, 8, X, IV, 17.

30 C. 3, X, IV, 3; c. 14, X, IV, 17.

31 For, if he would have taken solemn vows before marriage, he could not validly have contracted marriage.

fruit of such consummation being a child, this child would be illegitimate.[32] (b) If one in *higher orders* who had been married and with the consent of his wife (now by apostolic dispensation) received holy orders would consummate the marriage thus contracted, the offspring would be illegitimate.[33] These two exceptions presuppose an *illegitimate use* of a validly contracted marriage. *A fortiori* the same effect would be produced in case a religious with solemn vows or a cleric in higher orders had offspring with a concubine.

A distinction must therefore be made between different classes of illegitimate children.

1) *Natural* are those who are born of parents between whom either at the time of the conception or birth of the child a valid marriage could exist;

2) *Spurious* are those born of parents between whom at no time a valid marriage could exist. These latter are:

a) *Adulterous,* if born of parents one of whom was at the time lawfully wedded to another;

b) *Sacrilegious,* if born of parents who are bound by solemn religious vows or in sacred orders;

c) *Incestuous,* if born of an incestuous relation between persons legally related either by consanguinity or affinity in the collateral line.

d) *Nefarious,* if born of parents related in the direct line, *e. g.,* of a father and his daughter.

Prohibitive impediments can never render a child illegitimate.[34]

After laying down this general rule, the legislator explains how the *fact* of legitimacy can be proved or at least naturally presumed.

32 Cfr. c. 15, X, I, 17.

33 Cfr. cc. 1, 2, 14, X, I, 17.

34 Wernz, *l. c.,* IV, Vol. II, p. 586, n. 680. Simple religious vows (except those of the Jesuits) and those mentioned in can. 1058 do not affect the legitimacy of children.

Can. 1115 states in the first section: He whom marriage points out as such must be considered the father, unless the contrary is evident. This is nothing else but a *praesumptio iuris.* The law naturally supposes that children are the fruit of legal unions, not of adultery or fornication; and since the mother can be proved by the birth, whereas the father's coöperation is hidden in obscurity, the law must suppose the child to be a lawful issue. Such the Roman law,[35] from which our text is taken, justly supposed. As long, therefore, as the contrary is not evidently proved, a child belongs to the father whose consort has brought him forth. The proof always lies with him who denies or doubts his legitimacy. If the validity of a marriage is clearly established by the ecclesiastical record, every child born of that marriage is presumed to be legitimate, unless there is strict proof to the contrary. There are only two ways to prove the contrary: absence of the spouses from each other and impotency. A third is hardly imaginable.[36] The absence must be proved by trustworthy witnesses under oath; impotency is a subject of medical examination.

§ 2 adds that "*children born at least six months after the date of a marriage, or within ten months after the rupture of conjugal intercourse, are presumed to be legitimate.*" Here again the Roman[37] law has been adopted, with some modification as to the number of months. For the Roman law assumed seven months, on the authority of Hippocrates, who maintained that after that time a complete birth was possible. Note the term *presumed;* strict evidence would upset this presumption.

A *dissolutio vitae coniugalis,* or rupture of conjugal

35 Cfr. l. 5, Dig. II, 4, ll. 12, 19, 23, Dig. I, 5.

36 S. C. C., Aug. 9, 1884 (*A. S. S.*, Vol. XVII, 378 ff.); not even a baptismal record was accepted as proof against the child's legitimacy.

37 L. 12, Dig. I, 5; l. 29, pr. Dig. 28, 2.

life, may be brought about by a complete separation sanctioned by the ecclesiastical judge or by a declaration of nullity.[38] We may add that the question of legitimacy belongs to the *ecclesiastical judge,* whose sentence should be respected by the civil court.[39]

LEGITIMATION OF CHILDREN

Can. 1116

Per subsequens parentum matrimonium sive verum sive putativum, sive noviter contractum sive convalidatum, etiam non consummatum, legitima efficitur proles, dummodo parentes habiles exstiterint ad matrimonium inter se contrahendum tempore conceptionis, vel praegnationis, vel nativitatis.

Can. 1117

Filii legitimati per subsequens matrimonium, ad effectus canonicos quod attinet, in omnibus aequiparantur legitimis, nisi aliud expresse cautum fuerit.

Offspring is legitimated by the subsequent marriage of the parents, be that marriage contracted validly or putatively, either by a new contract or by revalidation, though not consummated, provided the parents were capable of contracting marriage between themselves either at the time of conception, or of pregnancy, or of birth.

The underlying idea of legitimation, which the Roman law [40] granted as a sort of adoption, and in virtue of the parental power, is here transparent and, we may say, "canonized." The English law is not so lenient, because it considers all children born before matrimony as bas-

38 C. 2, X, IV, 17.

39 C. 12, X, IV, 17; *Trid.*, sess. 24, c. 12, *de ref. mat.*

40 Cfr. § 13, Inst. I, 10; ll. 6, 10, Cod. V, 27.

tards. But even English law does not bastardize a child if it be born (though not begotten) in lawful wedlock, provided the parties married within a few months thereafter.[41] Our Missouri law says: "If a man, having by a woman a child or children, shall afterwards intermarry with her, and shall recognize such child or children to be his, they shall thereby be legitimate."[42] What our text (can. 1116) provides is as follows:

1. A *subsequent marriage, i. e.,* contracted after the birth of the offspring, has the power to render legitimate what would otherwise be considered illegitimate. Marriage has that power, although only by virtue of positive legislation.[43] Consequently ecclesiastical law requires the consent neither of the parents nor of the child. Nor does it, like our Missouri law, demand a formal act of recognition.

2. A marriage may be either *valid* on both sides, or *putative* because of an impediment on one side, unknown to the other.[44] Besides, a marriage may be *newly contracted* or revalidated by the renewal of consent. Now such a marriage need not follow immediately the birth of the offspring. If a woman would marry a man other than the one of whom she had conceived a child, and after her husband's death would marry the father of her child, the latter would be legitimate by virtue of the second marriage.[45] If a woman had a child from a man before marriage, and then married that man, but never *consummated* the marriage, the child would be legitimate.

3. *One condition* must, however, be added, *viz.,* that the *parents* were *capable* of contracting a marriage at any

41 Blackstone-Cooley, *Comment.*, I, 454.

42 Revised Statutes of Missouri, 1899, sect. 2917.

43 C. 6, X, IV, 17; Bened. XIV, "*Redditae Nobis,*" Sept. 17, 1746, § 39.

44 Reiffenstuel, IV, 17, n. 35 f.

45 *Ibid.*, n. 40.

of the three stages mentioned: conception, pregnancy, birth. Therefore, if an impediment existed at the time a child was begotten, but was removed by dispensation before he was born, the child is legitimate.

4. The question arises whether natural and spurious children are legitimated by a subsequent marriage of the parents. Observe, first, that the offspring must belong to that couple and not to a different man or woman. To speak concretely: if Gemma had a child from James and would marry John, this marriage would not legitimate the child begotten from James, unless, of course, Gemma would after the marriage with John marry James. The question proper is about *spurious* children of all kinds, whether they may be legitimated by subsequent marriage, and more especially concerning an adulterine child. This case is mentioned in the Decretals [46] and elaborately expounded by Benedict XIV in his letter to the archbishop of San Domingo.[47] Gemma was lawfully married to James, but had intercourse with John during her marriage, the fruit of which intercourse was Emma. Would Emma be legitimated by a subsequent marriage of Gemma and John? Answer: If James dies before Emma is born and Gemma marries John sometime after Emma's birth, Emma is legitimated by that marriage, because at the moment of her birth both Gemma and John were capable of contracting marriage. Therefore, though conceived in adultery, Emma was born in lawful wedlock and hence cannot be called an adulterine offspring.[48] It is supposed, of course, that no impediment of crime in-

46 C. 6, X, IV, 17.

47 "*Redditae Nobis*," Dec. 5, 1744; § 2 ff. is a fine specimen of canonical *ésprit* and lore.

48 C. 6, X, IV, 17, is not contradictory, for it mentions *proles susceptа*, which in canonical language means birth or baptism, as Reiffenstuel (IV, 17, n. 40) justly remarks. Therefore we are unable to grasp the argument of Wernz, *l. c.*, IV, Vol. II, p. 595, n. 686.

terfered. The answer applies to all ecclesiastical impediments. If the impediment was removed at the moment of birth, the child is legitimate. This seems to us the logical explanation of our canon, and it is borne out by the letter of Benedict XIV referred to.

Can. 1117 mentions the *canonical effects* of legitimation. Legitimated children partake of all the effects granted by Canon Law, unless the latter makes special exceptions. These canonical effects concern especially the capacity of being ordained without a dispensation and obtaining ecclesiastical benefices and appointments, also certain prelatures of inferior rank. The cardinalate [49] and the episcopacy [50] are excepted.

An additional remark: The Code does not mention another mode of legitimation, which was formerly in vogue and is always referred to by canonists, *viz.*, by *papal rescript.* The Pope can legitimate not only natural, but also spurious children, and the extent of a papal rescript on this subject has to be interpreted according to the general rules. Although the Code is silent about this mode of legitimation, there is no doubt that the Pope may issue such a rescript as far as canonical effects [51] are concerned. Besides, can. 1043 f. permit a legitimation in certain cases, which may be applied by the Ordinary or the pastor or any priest. Otherwise the faculty is given by the S. C. Sac. *pro foro externo.*

49 Sixtus V, "*Ad Romanum,*" Oct. 21, 1588, § 3; can. 232, § 2, n. 1.

50 Can. 331, § 1, n. 1.

51 C. 13, X, IV, 17, which, however, refers to the Papal States, and must therefore be interpreted accordingly.

CHAPTER X

SEPARATION OF MARRIED COUPLES

ART. I

DISSOLUTION OF THE MATRIMONIAL BOND

CAN. 1118

RATIFIED AND CONSUMMATED MARRIAGES INDISSOLUBLE

Matrimonium validum ratum et consummatum nulla humana potestate nullaque causa, praeterquam morte, dissolvi potest.

A valid Christian marriage, which has been consummated, can not be dissolved by any human authority or for any reason except by death.

To what has been said under can. 1013 there is little to be added. The *indissolubility* of a consummated Christian marriage (*ratum et consummatum*) was defended since at least the tenth century. Before that time we find some canons of particular synods, like those of Vermery (1752) and Compiègne (1757) which might be interpreted in the sense of a mitigated divorce.[1] The Penitential Books do not distinguish clearly between simultaneous and successive polygamy.[2] It is probable that the bishops could not strictly enforce the Christian ideal of marriage among semi-barbarous tribes. The case

1 *Verm. Syn.*, cc. 5, 9; *Comp.*, cc. 6, 9, 16.

2 Wasserschleben, *Die Bussord.*, pp. 148, 197.

proposed by St. Boniface and solved by Gregory II, in 726, looks like an accommodation to the circumstances of a newly converted country and is perhaps the first example of a solution of an unconsummated marriage by papal intervention.[3] A somewhat wavering attitude in matters of indissolubility is still noticeable at the time of Alexander III (1159–1181), who mentions diverse customs. However, it is evident that, though "some Roman Pontiffs appeared to think differently," their decisions never partook of the nature of an infallible decree or a dogmatic definition.[4]

After the twelfth century, however, the dissentient voices are hushed, and the indissolubility of a valid Christian marriage which had been perfected in its typical significance by the conjugal act, was strenuously defended.[5] Besides the cases brought before the Roman Pontiffs by Lothair (855–869), Philip I (1060–1108), Philip Augustus (1180–1223), Charles V (1364–1380) by the King of Aragon under Clement IV, by Henry VIII of England, and finally the famous case of Napoleon I under Pius VII, should convince any unbiased student of the firmness of the Apostolic See in this important matter.

The canon says: by no *human power* may such a marriage be dissolved. This comprises the Apostolic See also, as the Pope is the supreme lawgiver in matters purely ecclesiastical. But the canon is intended as a silent rebuke and reminder to the *civil power,* which has nearly everywhere made laws favoring divorce.

3 C. 18, C. 32, q. 7; Zehetbauer, *Das K.-R. bei Bonifatius,* 1910, p. 128.

4 *Summa Magistri Rolandi,* ed. Thaner, pp. 14, 187, 200; c. 3, X, IV, 4; *Summa Bernard. Pap.,* ed. Laspeyres, p. 298; Wernz, *l. c.,* IV, p. 525 (1 ed.).

5 Bened. XII, ann. 1341, prop. 102 *Armen. damn.; Trid.,* sess. 24, can. 7, *de sacr. mat.;* Leo XIII, "*Arcanum,*" Feb. 10, 1880.

CAN. 1119

MATRIMONIUM RATUM

Matrimonium non consummatum inter baptizatos vel inter partem baptizatam et partem non baptizatam, dissolvitur tum ipso iure per sollemnem professionem religiosam, tum per dispensationem a Sede Apostolica ex iusta causa concessam, utraque parte rogante vel alterutra, etsi altera sit invita.

An unconsummated marriage between two baptized persons, or between a baptized and a non-baptized person, is dissolved by solemn religious profession and by a dispensation granted by the Apostolic See for a just cause, if requested by both parties, or by only one, even though against the will of the other.

The historical development concerning religious profession and papal dispensation was uneven, the former being acknowledged earlier than the latter. The school of Paris opposed the *school of Bologna* with regard to the firmness of the matrimonial tie.[6] The latter maintained that a ratified but unconsummated marriage was destitute of the sacramental character and therefore liable to dissolution. The *school of Paris* ascribed the sacramental character and indissolubility to the *matrimonium ratum tantum.* Alexander III, as *Magister Rolandus,* adhered to the Bologna theory, but as Roman Pontiff paved the way for a golden mean by upholding the sacramental and truly contractual character of a ratified marriage, and at the same time maintaining the possibility of a dissolution of such a marriage by reason of a vow, affinity succeeding marriage, or complete mental

6 Cfr. Esmein, *l. c.,* p. 95 ff.; Freisen, *l. c.,* p. 190 ff.; De Smet, p. 227 f.

estrangement.[7] The religious vow was formally acknowledged by the former Master in the well-known Decretal "*Ex publico*" (c. 7, X, III, 32) and was, though perhaps reluctantly, sanctioned by Innocent XII, A. D. 1210.[8]

Not quite so rapid was the acknowledgment of the *papal power of dispensing* from a ratified marriage. For before the beginning of the fifteenth century there are no papal documents to be found which refer to a dispensation in the case of a merely ratified marriage. Yet it may safely be maintained that some canonists (though not the theologians), recognized papal authority *in casu*.[9] This was done at the reunion councils of Lyons (II) and Florence, and in a decree of the Tridentine Council.[10] The Greeks were more inclined to admit divorce because of fornication, and prompt to accuse the Latin Church of excessive rigor. After the Council of Trent papal dispensations from such marriages are not rare, as the decisions of the S. C. Concilii sufficiently prove.

The Code says: (1) that a marriage which is *only ratified*, but not consummated, may be dissolved. Hence the fact of non-consummation must be proved, which requires a special procedure.[11] Note that consummation here means the conjugal act in the married state; a fornicarious intercourse before marriage is not styled consummation, but the *copula* must be repeated after marriage.

(2) The marriage may be contracted *either* between two baptized persons *or* between one baptized and the other not baptized. There is no further species mentioned, as for instance, a legitimate marriage, *i.e.*, one contracted lawfully between two non-baptized persons.

7 Compil. I, cc. 4, 5, X, IV, 4; c. X, III, 32; c. 2, X, IV, 13.

8 C. 14, X, III, 32; Wernz, *l. c.*, IV, Vol. II, p. 605 f.; n. 696.

9 De Smet, *l. c.*, p. 229.

10 Sess. 24, can. 7, *de sac. mat.*

11 Cfr. can. 1960–1992; Wernz, *l. c.*, IV, Vol. 2, p. 619.

Is the following case included? James and Gemma married lawfully whilst both were not yet baptized, and consummated their marriage. Later, Gemma was baptized (in the Catholic Church), and the marriage between her and James was not consummated after her Baptism. We are aware of the controversy which exists among authors on this point. The wording of our text excludes neither opinion. Some say that the marriage in question was consummated, and consummation affects the whole marriage, as long as the bond lasts, because consummation, whether before or after Baptism, signifies the union between Christ and his Church through the Incarnation, and a union thus perfected is not weaker than a ratified marriage between baptized persons. Besides there are no instances in which the Roman Pontiff dispensed from a consummated marriage of infidels who were afterwards converted.[12] Thus the champions of the negative opinion. The defenders of the affirmative view employ exactly the opposite arguments. They say that a ratified marriage between Christians constitutes a stronger tie (*fortius vinculum*) than a consummated marriage between infidels. But when they are asked to produce documents proving that the popes exercised their power in such cases, they stretch the words of papal decisions. We rather incline to deny the power of dissolving in such cases. What, we may ask, is wanting to such a marriage? Baptism alone is wanting in the order of ratification. After Baptism you may as well call it *ratum et consummatum,* since the lawful consummation cannot be

12 Cfr. Bened. XIV, *De Syn. Dioec.,* XIII, 21, 4 f.; Feije, *De Impedimentis et Dispensat. Mat.,* 1885, ed. 3, p. 502, n. 602; Wernz, IV, Vol. II, p. 628; De Smet, *l. c.,* p. 229. But the faculty granted by Pius VII, Feb. 22, 1801 (*Collectanea S. Sedis,* Paris, 1880, n. 962, p. 433) would insinuate the fact of dispensation: "*copula carnalis praecesserat, sed nunquam subsecuta erat.*"

undone by Baptism. Yet we must confess that the text of can. 1119 seems to favor the contrary opinion, because the wording "*non consummatum inter baptizatos*" seems to lay stress on consummation *after* Baptism, and in that case even a marriage consummated before Baptism could be dissolved, not only by the Pauline privilege, as was heretofore generally assumed, but also by religious profession and papal dispensation.

(3) *Solemn religious profession,* then, by law dissolves a marriage as described. The profession required is solemn perpetual profession acknowledged as such by the Church. It is pronounced only in religious orders. No other kind of vow or profession has the effect here in question.[13] Hence the simple vows taken in the Society of Jesus have not the power of dissolving marriage.[14]

Of course, it is understood that the solemn profession is valid and not dispensed from. As a consequence, the moment one party pronounces the formula of profession, which is accepted by the lawful superior, the other party is free and may remarry. This rule works, we may say, automatically, so that no ecclesiastical court need intervene. This is meant by the phrase *ipso iure.* All that is needed is that the party remaining in the world be apprized of the fact of the solemn religious profession of the other.[15]

But there is another meaning attached to the expression "*ipso iure.*" It refers to the general or common ecclesiastical law which introduced this mode of dissolution in favor of religious profession. As the solemnity of the vows, so also this impediment set up by positive law

[13] S. C. super Statu Regul., Jan. 25, 1861.

[14] Wernz, IV, Vol. II, p. 627, n. 698.

[15] If a party not sufficiently informed of the other party's solemn profession would contract marriage with a third after this profession, the marriage would be valid, but illicit.

exists by ecclesiastical institution. It would be useless to search the Bible for a text to support the divine law which some [16] have assumed. The fact that before Alexander III no pontiff gave an authentic decision in this matter should suffice to prove that the law is of ecclesiastical institution.

(4) The second mode of dissolving a non-consummated marriage between baptized persons, or a mixed marriage, is by *papal dispensation.* This power, vicarious and instrumental as it is called, cannot be validly and licitly exercised without a *just reason.* Therefore the Pope is bound by *iustae causae,* otherwise the dispensation is invalid. The reason is that the indissolubility of marriage is founded on natural and divine law, to which the Pope himself is subject,[17] and therefore he may use his power only as a steward of God, or as an instrument in the hands of God.

The following reasons are *iustae causae* of more or less frequent occurrence:

(a) Proof that one party did not have the intention of binding himself or herself forever to the other; or that deception and fraud were practiced; or that fear and violence were used in order to force the reluctant party.

These reasons may be said to be derived from lack of *freedom and perfect consent,* though there is no agreement as to terminology.[18]

(b) *Impotency* of either party is frequently alleged in cases brought before the Roman tribunals; whence may follow aversion for the *state of virginity,* to which one party might be forced by the impotency of the other.[19]

16 Wernz, *l. c.,* p. 624, has given much attention to the refutation of the divine right theory.

17 Sanchez, *l. c.,* l. II, disp. 15, n. 6; cf. n. 1, where he justly observes: "*in hac quaestione satis confuse loquuntur doctores.*"

18 Richter, *Trid.,* p. 283, n. 141, n. 143; *A. Ap. S.,* V, 553 ff.

19 Richter, *ib.,* nn. 139, 147, 150;

(c) A desire to save the *good name* and reputation of the other party, or to avoid family troubles and feudal quarrels, or to keep up one's social status or rank.[20]

These are the reasons most frequently advanced in petitions for dispensation "*super matrimonio rato non consummato.*" The fact of non-consummation must be proved, otherwise all procedure is useless. Of this we shall hear more under Procedure in Matrimonial Cases (*infra*).

(5) A *petition* for dissolution may be submitted by both parties or by one party only, the other refusing to acquiesce. In the latter case the proof of non-consummation will be more difficult, especially if the other party is contumacious.

This may suffice for the present canon. We will only add that whether the term "*dispensation*" is to be taken in the strict or in a wider sense, is immaterial to the canonist, though we may interpret it as a declaration to the effect that in any particular case the marriage may be dissolved, and is dissolved, for a just reason by the authority set up by God.[21]

THE PAULINE PRIVILEGE

After declaring the absolute indissolubility of a Christian marriage validly contracted and consummated, and pointing out two ways of dissolving a merely ratified marriage, the Code proceeds to lay down rules concerning what is called the *privilegium fidei.* This is also styled the *Pauline privilege* because it is contained in 1 Cor. VII, 12–15, and is therefore said to have been

to this may be added contagious disease; cfr. Sanchez, *l. c.*, II, disp. 16, n. 5 f.

20 Richter, *ib.*, n. 145; but in one case of mere disparity of condition and nobility the S. C. would not dispense. Jan. 23, 1734 (Richter, *l. c.*, n. 142).

21 Wernz, *l. c.*, IV, Vol. II, p. 618.

promulgated by the Apostle of the Gentiles, although in fact it was granted by the Lord Himself in favor of faith.[22] It would seem to follow that this privilege, though promulgated by private authority, (" for the rest I speak, not the Lord ") is based upon divine law.

Traces of the use of the Pauline privilege are very rare in ancient times. Certain apparent allusions to it in the writings of Tertullian [23] and St. Augustine are doubtful. The latter [24] speaks of forsaking an infidel wife, but is silent about the solution of the marriage tie. *Gratian* [25] refers to the matter in a rather confused way. The subject is treated more plainly by Bernardus Papiensis [26] and especially by Tancred,[27] who distinguishes three reasons for which contumely against the Creator would dissolve a marriage: — cohabitation with contempt of the Creator, danger of being drawn into infidelity, and danger of mortal sin. The *Decretals* of Gregory IX mention the case in title 19, but in a cursory way, without emphasis. A wider range was given to the Pauline Privilege after the discovery of the New World. Paul III, with his constitution *" Altitudo,"* June 1, 1537, opened a new series of papal documents.[28] Since his day innumerable decisions have been given by the Holy Office and instructions issued by the S. C. de Propaganda Fide. These decisions and instructions shall be our main guide.

22 Bened. XIV, *De Syn. Dioec.*, VI, 4, 3; S. C. P. F., March 5, 1816 (*Coll.*, n. 704).

23 *Ad uxorem*, c. 2.

24 C. 4, C. 28, q. 1.

25 C. 28.

26 *Summa de Mat.*, ed. Laspeyres, p. 291.

27 *Summa de Spons. et Mat.*, ed. Wunderlich, p. 44.

28 Cfr. can. 1125, and appendix to the *Codex Iuris Canonici*, where the text of all three is inserted.

NATURE OF THE PAULINE PRIVILEGE

CAN. 1120

§ 1. Legitimum inter non baptizatos matrimonium, licet consummatum, solvitur in favorem fidei ex privilegio Paulino.

§ 2. Hoc privilegium non obtinet in matrimonio inter partem baptizatam et partem non baptizatam inito cum dispensatione ab impedimento disparitatis cultus.

A legitimate marriage between non-baptized persons, even though consummated, is dissolved in favor of the faith by the Pauline Privilege.

The Pauline privilege is expressed in *1 Cor. VII, 12–15:* "If any brother hath a wife that believeth not, and she consent to dwell with him, let him not put her away. And if any woman hath a husband that believeth not, and he consent to dwell with her, let her not put away her husband. . . . But if the unbeliever depart, let him depart. For a brother or sister is not under servitude in such cases. But God hath called us in peace."

Note the expressions: "consent to dwell with," "depart," and "unbeliever," around which the privilege clusters. The *favor of faith* is insinuated by the words: "not under servitude" and "peace."

(1) The *faith* in favor of which this privilege is asserted, is that of St. Paul and his brothers and sisters, therefore, the *Christian faith.* It is evident that the legislator means, first and above all, the *Catholic faith* (cfr. can. 1123). In matter of fact all the decisions [29] of the Roman congregations were prompted by Catholic mis-

29 At least the many which we perused never mention a heretical baptism. The reason is evident: non-Catholics do not appeal to the Pope.

sionaries and prelates, and given for converts who had embraced the Catholic faith.

(2) The marriage must have been contracted between non-baptized persons, or, in the words of the Apostle, between *unbelievers*. This is an important point, for if there is a *doubt* whether one of the parties was baptized, the privilege cannot be applied to him or her. Here is a case in point. Methodist preachers had been working in Oceania and baptized some of the inhabitants. The baptisms were of doubtful validity. When one of the women thus doubtfully baptized wished to embrace the Catholic faith, her husband refused to dwell with her. The question arose: May he be considered an unbeliever and the Pauline Privilege applied to her? The answer was no.[30] She could not simply be called an unbeliever. If both parties were unbelievers, the canonist would not trouble himself about them. Therefore, one must be *converted,* or rather baptized validly, because by baptism one enters the ranks of believers. *A catechumen, i.e.,* one who is taking instructions in the faith, is not yet entitled to that privilege, as has been decided[31] and is re-affirmed in the next canon.

(3) St. Paul uses the phrases: "to consent to dwell together," and, negatively, "to depart." If *departure* takes place, it is an evident sign that the unbeliever is unwilling to dwell under one roof with the believer. It may happen that the infidel party would consent to cohabit with

30 S. O., Dec. 18, 1872 (*Coll. P. F.*, n. 1392, Vol. II, p. 59): "*Utrum pars conversa propter gravissimum dubium de baptismo in haeresi recepto aequiparari possit parti ab infidelitati conversae, et propter Paulinum privilegium ad alias nuptias transire. S. C. Respondit: Negative. . . . Utrum baptismus dubius censendus sit validus in ordine ad matrimonium etiam in eo sensu, quod invalidum sit matrimonium inter haereticum dubie baptizatum, et infidelem propter impedimentum disparitatis cultus. S. C. respondit: Affirmative.*"

31 S. C. P. F., Jan. 16, 1803 (*Coll.*, n. 665).

the faithful spouse, but the latter would be subject to unpleasant and even sinful temptations from the part of the unbeliever. *Cohabitare sine contumelia Creatoris* means to live together without injury to faith and morals, or without offense to the Creator. No matter whether the unbeliever departs physically or morally from his converted partner, the privilege may be applied to the latter.

The unbeliever departs *physically,* (a) if he unjustly leaves his faithful consort who has given him no cause for departure; (b) if he contracts a marriage with another; (c) if he is detained by another consort (*a secundo marito*) or by a creditor for unpaid debts; (d) if he departs out of hatred for the faith of his consort.[32]

Moral departure might be brought about by the following reasons: (a) refusal of the unbeliever to live with the believing party without blaspheming the name of Christ,[33] or in other words only under the condition that the unbeliever could freely blaspheme the Christian name; (b) refusal to relinquish concubinage, which is an offense to God;[34] (c) refusal to permit the Catholic education of the offspring;[35] (d) attempts to seduce the Catholic party to idolatry;[36] (e) temptation on the part of the husband (not father- or mother-in-law) to grievous sins against conjugal chastity;[37] (f) continual dissensions and quarrels, for which the faithful party has given no cause, or for which he or she has made satisfaction and amendment; but this state must be serious and endanger salvation.[38]

32 S. O., July 4, 1855; June 12, 850; Aug. 5, 1759; P. F., Jan. 30, 1807 (*Coll. P. F.*, nn. 1114, 1044, 421, 690).

33 S. O., July 4, 1855 (*Coll. cit.*, n. 1114).

34 *Ibid.*

35 S. O., Dec. 14, 1848; July 11, 1866 (*Coll. cit.*, nn. 1036, 1295).

36 S. O., Aug. 5, 1759 (*Coll.*, n. 421).

37 P. F., March 5, 1816 (*Coll. cit.*, n. 704).

38 S. O., Aug. 5, 1759; April 26, 1899 (*Coll. cit.*, nn. 421, 2044).

Crimes committed by the faithful party before Baptism do not deprive him of the Pauline privilege; neither does he forfeit that right by crimes committed after Baptism, if they are not suspected by, or known to, the infidel party, because " when there is doubt, the verdict must be in favor of the faith." [39]

This, then, is the extent and nature of the Pauline privilege, granted in favor of the faith, which can be made use of only if the unbeliever does not wish to dwell with the faithful party, or at least not without offense to the Creator.

But, says § 2, this privilege *cannot be applied* to a marriage between a baptized and an unbaptized person contracted with a *dispensation* from the impediment of disparity of worship.[40] Hence if James was a Catholic and contracted marriage with Gemma, who was not baptized, having obtained a dispensation from the impediment of *disparitas cultus,* Gemma could not claim the Pauline privilege even though James should return to unbelief and she were willing to become a Catholic. Neither is the matrimonial tie solved when *both* consorts receive or intend to receive Baptism.[41] These are only preliminary requisites for dissolving a marriage contracted by both parties in unbelief; their marriage is not yet dissolved. The privilege requires some sort of legal verification to the effect that the required conditions are actually present. This process is called *interpellation.*

39 S. O., April 19, 1899 (*Coll.*, n. 2043).

40 S. O., March 5, 1852; July 4, 1855; Dec. 9, 1874 (*Coll.*, nn. 1070, 1114, 1427, ad 18).

41 S. O., July 11, 1866 (*Coll.*, n. 1295).

CHARACTER AND NECESSITY OF INTERPELLATION

CAN. 1121

§ 1. Antequam coniux conversus et baptizatus novum matrimonium valide contrahat, debet, salvo praescripto can. 1125, partem non baptizatam interpellare:

1.° An velit et ipsa converti ac baptismum suscipere;

2.° An saltem velit secum cohabitare pacifice sine contumelia Creatoris.

§ 2. Hae interpellationes fieri semper debent, nisi Sedes Apostolica aliud declaraverit.

§ 1. Before the converted and baptized party may proceed to a new marriage, he must, with due regard to the conditions mentioned in can. 1125, inquire of the unbaptized party:

1.° Whether she, too, will be converted and receive Baptism;

2.° Whether she would at least consent to peaceful cohabitation without offense to the Creator.

§ 2. These interpellations must always be made unless the Apostolic See has declared otherwise.

From § 1 it is evident that this interpellation must be made *after* Baptism. This injunction has been insisted upon time and again,[42] and must be considered *the rule*. However, in extraordinary cases, the Holy Office has granted *faculties* to make the interpellation during the time of the *catechumenate*. In these extraordinary cases the whereabouts of the infidel party were entirely unknown or he or she was so far away that interpellation would have been uncertain and difficult.[43]

Note that faculties are required, and compare what is said under can. 1125.

42 S. O., April, 1859 (*Coll.*, n. 1175).

43 S. O., June 3, 1874 (*Coll.*, n. 1415).

The interpellation must be *twofold:* (a) whether the infidel party would be willing to be converted and receive Baptism; (b) whether peaceful cohabitation would be consented to without offense to God. What the latter phrase means has been explained above.

This double question must be put even if evidence is at hand to show that the infidel party has no intention to be converted.[44] Neither is the double inquiry to be omitted in case a divorce has taken place and another marriage contracted according to civil law.[45]

The *necessity* of the twofold interpellation, as stated in § 2, has been emphatically inculcated by Benedict XIV[46] and by the Holy Office. It obliges both parties, husband as well as wife, with equal force.

It may have caused some surprise that the text says "*declaraverit,*" where we should have expected "*dispensaverit.*" But there is a solid reason for the term chosen. For the necessity is by *divine precept,* or "according to Apostolic sanction." The interpellation, therefore, is not to be looked upon as a mere formality or judiciary form. Benedict XIV's emphatic statement to this effect was adopted by the Holy Office,[47] which has declared that the *opinion* that the interpellation may be omitted whenever it cannot be made or would prove useless, *cannot be called safe in practice,* and insists upon instructing neophytes as to their obligation on this head.[48] Here, then, is the secret of the *declaraverit:* since the interpellation is part and parcel of the divine law, and the Holy See does not claim the power of dispensing from that law, the Code

44 P. F., March 5, 1816; Jan. 17, 1836 (*Coll.*, nn. 704, 845).

45 S. O., June 18, 1884; July 17, 1850 (*Coll.*, nn. 1620, 1045).

46 "*Apostolici ministerii,*" Sept. 16, 1747.

47 S. O., June 12, 1850; July 4, 1855; Sept. 16, 1824 (*Coll.*, nn. 1044, 1113, 784).

48 Bened. XIV, *De Syn. Dioec.*, VI, 4; XIII, 21; S. O., June 20, 1858 (*Coll.*, n. 1162).

has logically adopted the term *declare,* not *dispense.* With this explanation in view, if we have used or shall use the term *dispense,* let it be understood as the Apostolic See wishes it to be understood.

Can. 1122

Mode of interpellation

§ 1. Interpellationes fiant regulariter, forma saltem summaria et extraiudiciali, de auctoritate Ordinarii coniugis conversi, a quo Ordinario concedendae sunt quoque coniugi infideli, si quidem eas petierit, induciae ad deliberandum, eo tamen monito, fore ut, induciis inutiliter praeterlapsis, responsio praesumatur negativa.

§ 2. Interpellationes etiam privatim factae ab ipsa parte conversa, valent, imo sunt etiam licitae, si forma superius praescripta servari nequeat; hoc tamen in casu de ipsis, pro foro externo, constare debet duobus saltem testibus vel alio legitimo probationis modo.

§ 1. The interpellations should, as a rule, be made at least in summary and extrajudicial form with the authority of the Ordinary of the converted party. The same Ordinary may grant to the unbelieving party, who asks for it, time to deliberate,— a respite,— under the explicit condition, however, that failure to reply within the term conceded will be regarded as a negative answer.

§ 2. Private interpellations made by the converted party are valid, and also lawful, if the form prescribed above cannot be followed; but in that case evidence that the interpellation has been made must be given by at least two witnesses or in some other legal form.

§ 1 explains the *canonical mode of interpellation.* We

say *canonical,* not *judicial,* because the text admits of a summary and extrajudicial form of interpellation. But canonical procedure is not prescribed in all its rigor. Hence the regular form and order observed in canonical trials, presided over by a judge, with plaintiff and defendant, sworn witnesses and citations, etc., is not absolutely necessary. But a summary procedure is required and suffices.[49] Hence the episcopal court should at least summon the infidel party to appear or to send an answer, if possible under affidavit. What was formerly [50] prescribed concerning the posting of the summons at the church door may now be supplied by an advertisement in the newspapers, or by a letter sent by the episcopal court. In this letter a certain time must be set for answering the questions, which should be styled *peremptory,* so that the party may know that delay in answering is tantamount to forfeiture of any further claims. For, as the Regula Juris in 6° says: "Delay, if personal, hurts only the person concerned," [51] because a personal or regular delay, especially when the debtor is admonished by the creditor to pay within a certain time, is culpable and imputable to the culprit.

Private interpellations may validly be made by the parties themselves.[52] In that case two witnesses must either hear the question, or see the instrument (paper) that was sent to the other party, in order to have a proof for the interpellation and to prevent interference from the infidel party in a new marriage or challenge of its validity. An interpellation made by a private party in a case that came before the Propaganda [53] ran like this:

49 S. O., June 11, 1768 (*Coll.,* n. 430).

50 *Ibid.*

51 Reg. 26: "*Mora sua cuilibet nociva est*"; cfr. Reiffenstuel, *in h. reg.*

52 P. F., July 21, 1841 (*Coll.,* n. 929): Gasparri, *De Mat.,* n. 1089.

53 P. F., *ibid.*

"Will you take me again as your wife?" The answer was: "Go where you please." This was considered a sufficient interpellation. A mere bill of divorce or ejection from the home would be insufficient; even if the divorce papers could be exhibited, the interpellation must still be made, if at all possible.[54] *An interpellation once made is sufficient,* even in case the faithful party puts off marriage for a considerable time. But if the interpellation was dispensed with, it must be made, or the dispensation be renewed in case marriage is delayed for more than one year.[55] For charity's sake it may be made several times.[56]

EFFECT OF INTERPELLATION

CAN. 1123

Si interpellationes ex declaratione Sedis Apostolicae omissae fuerint, aut si infidelis eisdem negative responderit expresse vel tacite, pars baptizata ius habet novas nuptias cum persona catholica contrahendi, nisi ipsa post baptismum dederit parti non baptizatae iustam discedendi causam.

If the interpellations were omitted by virtue of a declaration of the Apostolic See, or if the infidel party has either explicitly or tacitly given a negative answer to them, the baptized party may contract a new marriage with a Catholic, unless he or she has, after Baptism, given just cause to the infidel party for departing.

54 P. F., March 5, 1816 (*Coll.*, n. 704).

55 P. F., June 26, 1820 (*Coll.*, n. 743).

56 S. O., June 12, 1850 (*Coll.*, n. 1044).

Can. 1124

Coniux fidelis, licet post susceptum baptismum denuo matrimonialiter cum parte infideli vixerit, ius tamen novas celebrandi nuptias cum persona catholica non amittit, ideoque potest hoc iure uti, si coniux infidelis, mutata voluntate, postea discedat sine iusta causa, vel iam non cohabitet pacifice sine contumelia Creatoris.

Although the baptized party has renewed marital relations with the infidel party after Baptism, he or she does not thereby lose the right to contract a new marriage with a Catholic, and that right may be used later if the infidel, having changed his mind, withdraws without a just cause, or refuses to cohabit peacefully without blaspheming the Creator.

These two canons manifestly complement each other, for both treat of the *effect of the Pauline privilege, viz.,* a new marriage.

§ 1. The first canon mentions the *declaration* of the Holy See, in virtue of which the interpellation was omitted.

(1) Interpellation in case of *polygamy* turns only about *one question, viz.:* whether the other party will be converted. This is done in order to cut short all superfluous interrogations, especially since there may be a doubt whether the marriage was valid precisely on account of polygamy or polyandry.[57] This may safely be called a general declaration, and therefore requires no special faculty.

(2) There is another *twofold* class of cases in which dispensation was required:

57 S. O., March 28, 1860; June 20, 1866; May 19, 1892; Sept. 5, 1855 (*Coll. P. F.*, nn. 1188, 1293 [I, p. 716], 1796, 1117 polyandry).

(a) *Ordinary cases,*[58] for which habitual faculties of dispensing were granted to the bishops and vicars apostolic. Ordinary cases are those in which it is impossible to find out the whereabouts of the infidel consort, or in which it is ascertained after an extrajudicial and summary investigation that the absent spouse can not be interpellated. Thus it may happen that no messenger can reach the place to which the other party has gone; or that the distance is so great that no message can be sent; or the polygamous party no longer remembers whom he first married; or the infidel party became insane and therefore could not be asked.[59]

(b) *Extraordinary cases,* "when the infidel party can be reached, but interpellation can not be made without serious damage to the faithful party or danger to Christians."[60] Damage threatened to, or feared by, the neophyte himself was declared insufficient for applying the faculty of dispensation.[61] There must be a real disadvantage, which will weigh all the heavier if it is combined with danger to a community. Note that most of the cases here cited were reported from missionary countries, China, Bengal, etc.

For the practical application of the Ordinary's power, we refer to the concluding paragraph of can. 1127. Here only note that the Constitution of Benedict XIV, *"In suprema,"* Jan. 6, 1754, may not be cited as conferring

58 S. O., Nov. 29, 1882 (*Coll.*, n. 1581): "*Ordinarius casus . . . tunc evenit, quando scilicet adhibitis antea omnibus diligentiis etiam per publicas ephemerides, ad reperiendum locum ubi conjux infidelis habitet, iisque in irritum cessis, constet saltem summarie et extrajudicialiter coniugem absentem moneri legitime non posse, aut monitum infra tempus in monitione praefixum, suam voluntatem non significasse. . . .*"

59 "*Altitudo,*" of Paul III; "*Romani Pontificis,*" of Pius V; S. O., June 8, 1836; Nov. 22, 1871 (*Coll.*, nn. 848, 1377).

60 S. O., Nov. 29, 1882 (*Coll.*, n. 1581).

61 S. O., Nov. 21, 1883 (*Coll.*, n. 1607); this faculty was given for a certain number of cases.

that faculty, for said constitution was of a strictly local, or personal nature, as it was given to a house of converts at Venice,[62] and is not mentioned in can. 1125.

Can. 1123 admits also an *express* or a tacit *negative answer.* Here it must be noted that if the answer to the first question (whether the infidel party consents to be converted) is negative, the second question concerning peaceful cohabitation must be put; and after a negative answer the faithful party is entitled to contract a new marriage. This is the effect of an express or explicit negative answer. *A tacit negative* answer would be lapse of the term assigned for answering, no matter whether the delay was caused by malicious and intentional neglect or by physical or moral impossibility.[63] After such an answer has been received, the favor must be granted, and the baptized party is free to marry again. However the canon lays down a condition: unless he or she has given to the infidel party just cause for desertion. A *just cause* would be adultery known to the infidel party, or leading a scandalous life, or serious neglect of the marital duty and education.[64] Therefore concubinage must be given up because incompatible with Christian morals.[65]

Lastly the canon appears to exclude a marriage of the converted party with any one but a *Catholic*; that is to say, the convert must marry a Catholic. This must be considered *as a rule,* which, however, admits of exceptions. For there are several cases related in the *Collectanea P. F.* in which a dispensation from the impediment of disparity of worship was granted. Thus a woman who had married (?) a second husband, who himself

62 The *Coll. P. F.* placed it in the Appendix, n. 2252.

63 S. O., June 12, 1850 (*Coll.*, n. 1044); the supposed wife was held captive by another.

64 S. O., April 19, 1899 (*Coll.*, n. 2043); June 20, 1866 (*Coll.*, n. 1293, I. p. 716).

65 S. O., March 28, 1860 (*Coll.*, n. 1188).

had dismissed his first wife, and borne him children, was granted a dispensation even though the husband refused to be converted.[66] And one instruction of the Holy Office[67] says, in general terms, that if out of a number of concubines who are heretics, one is to be taken as the lawful wife, with renewal of the consent, care should be taken that she become a Catholic, *lest a dispensation* from mixed religion should be necessary, which for just reasons is granted. Therefore our canon states a rule, but does not exclude exceptions.

Can. 1124 extends the privilege to the case where marital relations have been resumed between an infidel and a baptized party *after the latter's Baptism*, but the infidel *changes his* mind and vexes the convert with machinations against the faith, or tries to get him to practice idolatry, or makes attempts against conjugal loyalty, or contracts a new marriage. Here the *contumelia Creatoris* is *verified*,[68] and in all such cases the baptized party is entitled to make use of the Pauline privilege, even though there are children born after his or her Baptism. This holds even if the baptized party committed a crime, provided only that this crime is not the cause of the changed attitude of the infidel party.[69]

THREE PAPAL CONSTITUTIONS

Can. 1125

Ea quae matrimonium respiciunt in constitutionibus Pauli III *Altitudo*, 1 Iun. 1537; S. Pii V *Romani Pontificis*, 2 Aug. 1571; Gregorii XIII *Populis*, 25

66 S. O., Sept. 12, 1855 (*Coll.*, n. 1118).

67 March 28, 1860.

68 S. O., Aug. 5, 1759; July 4, 1855; July 11, 1866; S. C. P. F., March 5, 1816 (*Coll.*, nn. 421, 1114, 1295, 704).

69 S. O., April 19, 1899 (*Coll.*, n. 2043).

Ian. 1585, quaeque pro peculiaribus locis scripta sunt, ad alias quoque regiones in eisdem adiunctis extenduntur.

In whatever concerns marriage, the constitutions of Paul III, "*Altitudo,*" of June 1, 1537, of St. Pius V, "*Romani Pontificis,*" of Aug. 2, 1570, of Gregory XIII, "*Populis,*" of Jan. 25, 1585, though given for particular places, are [hereby] extended to all countries situated in the same circumstances.

This canon must be looked upon as a declaration, and therefore as inducing general or common law.[70] The constitution of *Paul III* was given for the West Indies and South America. The part that concerns us reads: As to marriages, we enact that those who had several wives before their conversion, but do not remember which they married first, may after their conversion choose the one whom they love best and contract marriage with her by expressing the usual consent; but those who remember whom they married first, must retain this one and dismiss the others. We furthermore permit them to marry validly persons related to them in the third degree of consanguinity or affinity. *St. Pius V's* Constitution, also directed to the Indies, considers the case of polygamy. One husband had many wives and dismissed several. After Baptism he was allowed to keep the one who was baptized together with him, whether she was his legitimate wife or not. To do away with all scruples on the part of bishops and missionaries, the Pope allowed these Indians to keep the woman who had received baptism as the lawful wife. That this favor was granted for the Indians only, and could not be extended to other regions without intervention by the

70 The constitutions themselves are reprinted in the appendix to the Code.

Apostolic See, was duly recognized by the Archbishop of Quebec, who implored Gregory XVI to grant such an extension.[71] It was granted. The decision has a peculiar interest. It refers directly to the constitution of Pius V, whereas the Holy Office distinguished two different cases, regardless of whether the first marriage was valid or not. If the first marriage contracted with wife No. 1 was valid, the husband has to retain her if she was also converted or consented to live with him without blasphemy of the Creator. But if the first marriage was invalid, and the subsequent valid,[72] the convert was allowed to choose from among his several so-called wives the one who was ready to be baptized or any other who was not formerly his wife, provided she was ready to be baptized and the consent was renewed. The decision added: If, in case of the first marriage being valid, the husband would not take the one he married first, but the second or third, because the first wife remained an infidel, he must renew the consent, and the Ordinary must apply the faculty of dispensing from an interpellation of the first wife if such interpellation could not be made or would prove useless.[73] This sounds like a modification or interpretation of an otherwise far-going Constitution. In matter of fact the Constitution of Gregory XIII was restricted to missionary countries (Angola, Ethiopia, Brazil, and India) and to Ordinaries and missionaries, especially of the Society of Jesus, who could dispense converts married before Baptism, enabling them to contract a Catholic marriage, though the pagan consort was still alive, without as much as asking the latter's consent or expecting an answer. But the Pontiff added that

71 S. O., June 8, 1836 (*Coll.*, n. 848).

72 *Ibid.*: "*ut dubitari possit matrimonia huiusmodi ad instar belluarum censenda esse.*"

73 Bened. XIV, *De Syn. Dioec.*, XIII, c. 21.

evidence must be furnished, at least by summary and extra-judicial investigation, that the wife could not lawfully be interpellated or that, if interpellated, she could not answer within the time prescribed in the interpellation. Marriages thus contracted by converts were declared to be valid even if it should become known afterwards that the former consorts had been prevented from giving an answer and had been converted to the true faith at the time the second marriage was contracted. Here interpellation of some sort is required. What then are the distinctive characteristics of these three constitutions? Put in order they are:

Paul III	*Pius V*	*Gregory XIII*
Supposes polygamy.— First wife to be retained if remembered; otherwise the husband may choose the one whom he prefers, whether baptized or not.— New consent required.— No interpellation.	Supposes polygamy.— Man may retain any one of the women he has married, if she embraces the faith.— No consent prescribed.— No interpellation necessary.	Does not mention polygamy, but captivity of the infidel party. — Baptized party may marry any husband who is a believer, even though of another rite.— Summary interpellation.

From this juxtaposition it will easily be perceived that the most favorable interpretation is that of St. Pius. But at the same time it is the least canonical, stretching the privilege to its very limit, because it pays regard neither to the former marriage nor to interpellation. Paul III's constitution attempts to preserve a semblance of legitimate marriage, since it requires that the first wife must be retained, if remembered, and the consent renewed. A purer notion of the Pauline privilege is manifested by the constitution of Gregory XIII.

A difficulty remains as to the consent and the necessity of interpellation by divine right. As to the *consent* necessary for every marriage, clearly no pope could have

the intention to dispense therefrom. Hence *if a marriage* contracted in infidelity was *valid* or legitimate, no *new consent* is required if the husband after Baptism retains his legitimate wife, *i.e.,* the one, as Paul III supposes, whom he married first. If, however, the marriage contracted in infidelity was *invalid,* either for lack of consent or on account of a condition which invalidated the substance of marriage, or by reason of an existing impediment of natural or divine law,[74] the husband after his conversion was allowed to marry another woman, who, according to St. Pius's constitution, must be a Catholic; and this marriage must be contracted by *renewed consent* and with due regard to the prescribed form.[75]

What about the *necessity of interpellation,* which Paul III and Pius V seem to disregard entirely? There can no longer be any doubt that their constitutions amount to a declaration,[76] and are not a relaxation, of the law. By a declaration the Pope merely explains the divine law which prescribes interpellation, declaring that in particular circumstances, for which the declaration is given, the law ceases to bind [77] in its whole latitude, as far as interpellation is concerned.

The new Code, in general terms, extends these constitutions to all countries where the *same,* not merely similar, *circumstances* prevail. Such is the case in pagan countries chiefly. Note that these circumstances must effect the *countries,* not merely persons, as the three constitutions were issued for particular countries, not cases. We

74 Divine or natural law prohibits polygamy, wherefore Pius V may be said to suppose these polygamous marriages to be invalid.

75 Feije, *l. c.,* n. 486, p. 358.

76 Pius V says: "*declaramus*"; Paul III: "*decernimus.*"

77 Feije, *l. c.,* n. 494, p. 373, adding however: "*Quoad necessitatem retinendi primam uxorem volentem saltem pacifice cohabitare.*" This addition does not save the Constitution of Pius V.

scarcely believe that the U. S., or even our Indian Reservations, could claim to be included in this category.

FORMER MARRIAGE DISSOLVED

CAN. 1126

Vinculum prioris coniugii, in infidelitate contracti, tunc tantum solvitur, cum pars fidelis reapse novas nuptias valide iniverit.

The bond of a first marriage, contracted in infidelity, is dissolved only when the baptized party contracts a new marriage validly. The dissolution of the former bond takes place at the moment when the baptized party gives his or her consent to a new marriage. From that moment the infidel party is free.

This doctrine may be called certain, as there is no reason to doubt that the infidel party may validly contract a new marriage, although Benedict XIV entertained a doubt on this head.[78] It is a principle of common law, as the H. O. plainly states, that if the wife is freed from the conjugal tie, the husband also is freed, for the bond is mutual, and therefore the freedom of the one entails freedom for the other.[79] And this freedom certainly involves the liberty of contracting a new marriage. Or is perhaps the favor of faith to be understood as involving a necessary disadvantage to the unbeliever? This assumption would only cause hatred against religion. But if the baptized party does not *contract a new marriage,* the unbeliever is not free, but bound to celibacy according to ecclesiastical law. The following case is to the point.

78 Benedict XIV, "*Postremo mense,*" Feb. 28, 1747, § 58; but it appears as certain in S. O., Aug. 5, 1759; July 11, 1866 (*Coll.*, nn. 421, 1295).

79 S. O., Sept. 16, 1824 (*Coll.*, n. 784, I, p. 453).

A Chinaman who sold his wife and married another, wished to embrace the faith. Interpellation showed that the first wife was ready to become a Catholic, but could not because detained by the man who purchased her. The decision of the Holy Office was that the Chinaman could not be baptized unless he dismissed his second wife, and the first wife was told to abstain from carnal intercourse with her second husband as a condition of Baptism.[80]

Note the word *"tantum"* in the text: it excludes entry into the religious state and the reception of holy orders, because the baptized person taking such a step would not be free from the marriage bond, and therefore neither would the infidel party, who consequently could not marry validly if his consort became a religious or received higher orders. Both these steps, moreover, would require an apostolic dispensation. The party who entered religion by profession, or received orders, would not be obliged to resume his relations with the other party after religious profession or ordination. On the other hand, if the infidel party became converted and baptized before the other made religious profession or received orders, it appears but just and reasonable to maintain that the party first converted should return to the other.[81] Whether the Pauline privilege may be applied in case one party joins a non-Catholic sect, is a canonically useless question, because the Holy See would hardly be consulted in such a case.[82]

80 S. O., Jan. 29, 1805 (*Coll.*, n. 680).

81 Feije, *l. c.*, n. 500, p. 378 f.

82 Feije, *l. c.*, n. 502, p. 381.

PRESUMPTION IN DOUBTFUL CASES

CAN. 1127

In re dubia privilegium fidei gaudet favore iuris.

In doubtful cases the law favors the privilege of faith, i.e., the liberty of the convert to remarry. Such cases have been solved by the H. O. In one case there was a doubt as to the validity of former marriages, and the husband was allowed to choose any of the women he had married, or another, provided she embraced the faith.[83] In another case, from Sioux Falls, S. D., Indians claimed they had married several women to test their character but with no intention of contracting a real marriage. The decision was that if their statement were found true, the marriages were to be held invalid; if doubtful, and the women were not baptized, they were free to marry whom they pleased.[84] In another case it was decided that crimes committed before or after Baptism were not a sufficient reason for the departure of the infidel party.[85]

A peculiarly delicate case was this: The husband became converted and continued cohabitation, but on account of continual quarrels finally left his wife, asserting that he had never intended to take her for his wife. The latter after her conversion would not return to him. May the husband marry another? If persuasion is useless, and he has given no cause for the woman's departure or made satisfaction afterwards, and if he is in danger of eternal damnation, then, after formal interpellation, he may marry another.[86] That this is the limit

83 S. O., Dec. 9, 1874 ad 13 (*Coll.*, n. 1427).

84 S. O., May 19, 1892 (*Coll.*, n. 1796).

85 S. O., April 19, 1899 (*Coll.*, n. 2043).

86 S. O., April 26, 1899 (*Coll.*, n. 2044): "*et ad mentem.— Mens est ut in dubio iudicium sit in favorem fidei.*"

of the privilege of faith is evident from the many clauses added in the rescript.

The question may be asked: What about the *faculties of our bishops* who enjoyed the right of dispensing with gentiles (see Form I, art. II)? The answer, we believe, should be as follows:

1. This faculty in the proper sense of the word is no longer given, since the Holy See claims *no dispensation,* but merely a declaration.

2. This *declaration* may be given only by the Holy See itself (Holy Office), but by no inferior authority.

3. In *ordinary cases,* which do not fall under the three constitutions, bishops must proceed according to the Code. Therefore:

(a) The marriage must have been contracted by both parties whilst they were certainly unbaptized; a dubious Baptism would not permit the application of the privilege;

(b) After Baptism, and not before, either a summary canonical interpellation authorized by the Ordinary, or a private interpellation duly proved, must be made to the infidel party concerning the two questions;

(c) In the case of *polygamists* one question: "whether the unbeliever will be converted," is sufficient;

(d) After a negative answer, or undue delay in answering, the baptized party may contract a new marriage, in virtue of which the former marriage is dissolved and the infidel party becomes free. No other intervention on the part of the Ordinary is needed.

4. The *extraordinary case* mentioned above (under can. 1124, § 1, n. 2, b) falls under the favor of law and may therefore be solved by the Ordinary.

5. Concerning the cases mentioned in the *three constitutions,* the Ordinaries are judges whether their coun-

try is situated in the same circumstances as those for which said constitutions were given. But they are not allowed simply to make use of that privileged declaration if the circumstances concern particular parties only; for such an extension a new papal declaration would be needed.

Here we close the consideration of the Pauline Privilege. Its importance seemed to call for a somewhat extensive treatment. For the rest, we have followed a safe guide, and abstained as much as possible from the use of secondary sources.

ART. II

SEPARATION AS TO BED, BOARD, AND DWELLING-PLACE

CAN. 1128

Coniuges servare debent vitae coniugalis communionem, nisi iusta causa eos excuset.

Married people are bound to live together unless they have a just cause for separation.

This follows mainly from the secondary purpose of marriage, *i.e.*, mutual help, which requires a common dwelling-place. However, there may be weighty reasons that excuse from conjugal cohabitation. The Council of Florence (1439–1442) maintained the indissolubility of marriage against the Greeks, but admitted separation for reason of adultery.[87] The Council of Trent declared that such a separation was permissible either forever or for a certain time.[88] But the *reason* must be one which an ecclesiastical judge will acknowledge as *canonical* and which would justify him in pronouncing sentence of sep-

87 *Decretum pro Armenis*, Denzinger, *l. c.*, n. 597.

88 Sess. 24, can. 8, *de sacr. mat.*

aration. This also obtains when a baptized person has contracted marriage with an unbeliever, with a dispensation from disparity of worship, and the latter proves to be an adulterer.[89]

Separation must be duly distinguished from *divorce* in the proper sense. The latter generally implies dissolution of the matrimonial bond. Such a dissolution is possible only, as the preceding canons have enacted, in cases of marriage contracted between baptized persons and not yet consummated, if either solemn religious profession is made, or a papal dispensation obtained. A legitimate marriage which has been duly consummated can be dissolved by the application of the Pauline privilege. *Separation* leaves the marriage bond intact.

ADULTERY A CAUSE OF SEPARATION

CAN. 1129

§ 1. Propter coniugis adulterium, alter coniux, manente vinculo, ius habet solvendi, etiam in perpetuum, vitae communionem, nisi in crimen consenserit, aut eidem causam dederit, vel illud expresse aut tacite condonaverit, vel ipse quoque idem crimen commiserit.

§ 2. Tacita condonatio habetur, si coniux innocens, postquam de crimine adulterii certior factus est, cum altero coniuge sponte, maritali affectu, conversatus fuerit; praesumitur vero, nisi sex intra menses coniugem adulterum expulerit vel dereliquerit, aut legitimam accusationem fecerit.

§ 1. If one of the spouses commits *adultery,* the other has cause for separation, either forever or for a time, and may therefore leave hearth and home. However, sep-

89 S. O., July 4, 1855 (*Coll.*, n. 1114).

aration is not permitted if the second party has consented to the crime, or been responsible for it, or has either expressly or tacitly condoned it, or committed the same crime.

(1) *Adultery,* to be a cause of separation, must be certain and consummated by carnal intercourse.[90] A mere suspicion would not be sufficient,[91] but a strong presumption would. Such a presumption would be if the wife were found or seen with another man in a very compromising position.[92] But some sort of proof is required. Here it may be remarked that jealousy is a fertile motive of suspicion, which should not be accepted by an ecclesiastical judge. Fornication committed before marriage is not adultery.[93]

(2) But although one party may have committed adultery (which would of itself be a sufficient and canonical reason for dismissal) yet if any one of the four conditions mentioned in can. 1129, § 1, is present, the right of dismissal ceases. These conditions are:

(a) If the so-called innocent party has *consented* to the other's adultery. This would be the case if the husband would deliver his wife to a friend or relative for the purpose,[94] or if he would, as it were, sell her for money. But we believe that even in that case a formal or express consent is required, because no one may be supposed to deprive himself of the exclusive right conferred by marriage.

(b) If one party has *given cause* to the other for committing adultery. This happens if the husband does

90 Some, *v. g.* Feije (*l. c.*, n. 579, p. 464) require "formal" adultery, but we fail to see the necessity of adding that adjective, since a validly married person cannot commit simple fornication.

91 c. 2, C. 32, q. 1; c. 23, C. 32, q. 5, etc., all require proof.

92 C. 12, X, II, 23: *solus cum sola, nudus cum nuda.*

93 C. 25, X, II, 24.

94 C. 6, X, IV, 13.

not support his wife decently, so that she is compelled to seek a livelihood by improper means;[95] or if he deserts her,[96] or if the wife would have frequent *lapsus carnis* with others, although perhaps not amounting to real adultery;[97] or if she would unreasonably refuse her husband the *debitum.*

(c) If the so-called innocent party would *also commit adultery,* and would not purge himself or herself of that imputation;[98] because "equal crimes are wiped out by mutual compensation."[99]

(d) If no *express or tacit condonation* or pardon has followed. The latter case is explained in § 2 of our canon which says: Adultery is *condoned tacitly,* if the innocent party has freely had marital relations with the adulterous party after knowing of the adultery; *condonation* is *presumed* if the innocent party does not expel or leave the guilty party or bring the case into court within six months.

Concerning reconciliation or condonation two rules may be regarded as certain: 1. The husband is not obliged to be reconciled to his adulterous wife, and, 2. He may, if he wishes, receive her back into his confidence.[1] The same rules apply to the wife, although the text[2] and the authors mention her case only for reasons which are more or less physiological. But the fact that marriage rights are mutual and equal must not suffer obscuration. Besides, a strict obligation on the part of the husband to dismiss his adulterous consort cannot be solidly proved.[3] Therefore our Code admits reconciliation. This must be effected by some visible or external sign,

95 C. 5, X, IV, 19.

96 C. 4, X, IV, 19; such were excommunicated; cfr. C. 32, q. 7, *passim.*

97 C. 19, X, III, 32.

98 C. 1, C. 32, q. 6.

99 C. 7, X, V, 16: "*cum paria crimina mutua compensatione deleantur.*"

1 Sanchez, *l. c.,* l. X, disp. 13, n. 1 ff.

2 C. 3, X, V, 16.

3 Sanchez, *l. c.,* nn. 6 ff.

as the Code expresses it, by *marital conversation* or *relation.* Such would be asking the *debitum conjugale,* or other familiarities usual between married people. But these signs must be *spontaneous,* not prompted by compulsion or fear (*sponte,* says the text), and hence merely to render the *debitum* would not be a sure sign. Furthermore it is required that the fact of adultery was really and undoubtedly known (*adulterii certior factus*), because condonation is impossible as long as the injury is unknown. Hence even if marital intercourse had occurred during the time of uncertainty, this act would not preclude the use of the right of the innocent party to leave the faithless one, after certain knowledge has been obtained.[4]

The second clause of § 2, can. 1129, mentions *presumption.* The law presumes condonation of adultery if after *six months* the innocent party has not made use of his or her right under the law. The Roman law provided peremptory prescription five years after the date of knowledge, so that after this period an accusation against the adulterous party was no longer admitted.[5] The ecclesiastical law draws no limit, and therefore accusations may be brought at any time, if no condonation has taken place. The Roman law also admitted a period of sixty days, within which the father and the husband could accuse the adulteress, and four months more were granted to outsiders to bring forward the accusation. In practice six months were permitted also to the husband for accusation.[6] This custom is adopted by the Code. After the lapse of that term the lawgiver *presumes* condonation if the unfaithful party was not expelled or deserted.

4 *Ibid.,* disp. 14.

5 L. 5, Cod. IX, 9, *ad legem juliam de adult. et stupro.*

6 L. 4, dig. 48, 5, *ad legem juliam de adult. corrig.*

This is, however, merely a presumption, which does not take away the right if evident and conclusive reasons are advanced for not having made use of it. However, it may be safely stated that an accusation brought later than six months *post factum* would require strict proof that no marital conversation or relation had taken place between husband and wife during the intervening period. The law presumes condonation in order to maintain peace in the family.

TAKING BACK THE GUILTY PARTNER

Can. 1130

Coniux innocens, sive iudicis sententia sive propria auctoritate legitime discesserit, nulla unquam obligatione tenetur coniugem adulterum rursus admittendi ad vitae consortium; potest autem eundem admittere aut revocare, nisi ex ipsius consensu ille statum matrimonio contrarium susceperit.

The innocent spouse, if he or she has separated from the other legitimately, either by a judicial sentence or by private authority, is *under no obligation* to readmit the guilty partner to married life; they may, however, admit or recall each other, unless, with the consent of the innocent spouse, the guilty one has embraced a state incompatible with matrimony.

What we have said above is here corroborated, and therefore the controversy mentioned by Sanchez,[7] as to the obligation of dismissing the adulterous party, is now out of date. Note that the innocent spouse may depart of *his or her own accord,* without appealing to court. This should not, however, be done unless the fact of adultery [8] is proved, otherwise restitution may be claimed.

7 *L. c.*, l. X, disp. 13, n. 4.

8 Although sodomy and bestiality

The second clause states that reconciliation or resumption of married life, though permissible in itself, becomes impossible if the guilty spouse, with the consent of the innocent one, has embraced a *state of life incompatible with Matrimony.* Such a change is brought about by entering the religious state or receiving sacred orders. Since no one can be validly admitted to religion who is bound by the matrimonial tie,[9] the circumstance of adultery must be expressed in the petition to be sent to the Holy See. Furthermore, an Apostolic dispensation is required for holy orders to be received by a married man.[10] If a dispensation is granted and religion is entered or sacred orders are received, the guiltless party has no longer any claim on the party who embraces the religious state or was ordained subdeacon.[11] *A fortiori,* the adulterous party has no right to choose another state of life without the free consent of the innocent party.[12] The term *religious state* implies not only solemn but also simple (either temporary or perpetual) vows. But it may be well to repeat that entering a religious order with solemn profession does not dissolve the bond of a consummated marriage, and that, therefore, the party remaining in the world cannot validly contract another marriage. All these consequences the disloyal spouse must attribute to his own infidelity, because one who is himself unfaithful has no right to expect loyalty from others.[13]

differ specifically from adultery, yet both would be sufficient reasons for asserting the right *in casu,* cfr. Sanchez, *l. c.,* l. X, disp. 4, n. 13 f.

9 Can. 542.

10 Can. 132, § 3.

11 Cfr. cc. 15, 19, X, III, 32; c. 4, X, IV, 19.

12 Sanchez, *l. c.,* l. X, disp. 10, n. 12 f.

13 *Reg. Iuris* 75 *in* 60: "*Frustra sibi fidem quis postulat ab eo servari, qui fidem a se praestitam servare recusat.*"

OTHER CAUSES FOR SEPARATION

CAN. 1131

§ 1. Si alter coniux sectae acatholicae nomen dederit; si prolem acatholice educaverit; si vitam criminosam et ignominiosam ducat; si grave seu animae seu corporis periculum alteri facessat; si saevitiis vitam communem nimis difficilem reddat, haec aliaque id genus, sunt pro altero coniuge totidem legitimae causae discedendi, auctoritate Ordinarii loci, et etiam propria auctoritate, si de eis certo constet, et periculum sit in mora.

§ 2. In omnibus his casibus, causa separationis cessante, vitae consuetudo restauranda est; sed si separatio ab Ordinario pronuntiata fuerit ad certum incertumve tempus, coniux innocens ad id non obligatur, nisi ex decreto Ordinarii vel exacto tempore.

The Code now proceeds to enumerate other causes for separation besides adultery. Such causes are, for example, if the other party joins a non-Catholic sect; or gives his children an education which is not Catholic; or leads a scandalous and disgraceful life; or gravely endangers the spiritual or bodily welfare of the other; or renders the marital union intolerable by acts of cruelty. These and similar reasons give the other spouse the right to withdraw by appealing to the Ordinary of the diocese, or even without legal process, if they are proved with certainty and delay would be dangerous.

It is a commonplace of ecclesiastical writers to compare infidelity, idolatry, heresy to fornication or spiritual adultery and on this ground to admit separation.[14] This is the first cause mentioned in the text. The second is

14 Cfr. c. 5, C. 28, q. 1; c. 7, C. 32, q. 7; c. 1, C. 33, q. 2.

educating one's children in a non-Catholic denomination, to which category belong also the "Old Catholics." A third cause is leading a criminal or shameful life (robbery, bawdry,[15] drunkenness). A fourth cause is spiritual or bodily danger. There would be spiritual danger if the Catholic party were prevented from exercising his or her religion, or persistent onanism. Bodily danger accrues from contagious diseases of an incurable and hereditary nature.[16] By cruelty is here understood not only quarrelsome and angry wrangling, but actual maltreatment (wife-beating).[17]

Whenever such a cause is proved by facts and witnesses, the innocent party may freely depart, or invoke the episcopal court. However, says § 2, when the reasons that prompted the separation cease, the marital relation must be restored. Only after the ecclesiastical court has rendered a decision in favor of a separation, either for a limited term or indefinitely, is the innocent spouse free from the duty of cohabitation.[18] If the Ordinary should command resumption of cohabitation, or if the decree of separation was given for a limited period only, married life must be resumed. It is, therefore, always safer to invoke the ecclesiastical court in such cases.[19] A civil court may indeed give sentence of temporary divorce or separation, but this has merely the effect of private separation, unless the episcopal court accepts the evidence and verdict of the civil court and makes them its own.

15 C. 4, C. 28, q. 1.

16 The S. C. Conc., March 11; Sept. 19; Dec. 16, 1786 (Richter, *Trid.*, p. 290, n. 158) reluctantly granted separation on account of the "Celtic disease."

17 Verbal injuries are insufficient; S. C. C., June 13, 1789.

18 Cfr. c. 1, C. 33, q. 2; c. 6, X, IV, 19.

19 This is especially the case if one party has taken an oath not to accuse the other of adultery; c. 25, X, II, 24.

EDUCATION OF CHILDREN

CAN. 1132

Instituta separatione, filii educandi sunt penes coniugem innocentem, et si alter coniugum sit acatholicus, penes coniugem catholicum, nisi in utroque casu Ordinarius pro ipsorum filiorum bono, salva semper eorumdem catholica educatione, aliud decreverit.

After the separation, the children must be educated by the innocent spouse. If one of the parties is a non-Catholic, the education of the children belongs to the Catholic party, unless in either case the Ordinary decides otherwise for the good of the children and their Catholic education is duly provided for. Hence children of a mixed marriage may be entrusted to the non-Catholic parent, if, for instance, there is a mother-in-law, or aunt, or other relative who sees to their Catholic education. The underlying reason for this law is that the Catholic Church considers herself the guardian of the faith.[20] Difficulties may occur under this canon, especially in countries which have laws determining the children's religion. The rule should be to safeguard the Catholic education of the children in the best and least offensive way.

[20] C. 2, X, III, 33.

CHAPTER XI

REVALIDATION OF MARRIAGE

A marriage, sooner or later, may be discovered to be suffering from an impediment which rendered it invalid at the time it was contracted. Marriage being a bilateral contract between two capable persons, it is evident that, if the consent was defective or the parties were prevented by an impediment, there was no marriage in any given case. This discovery may cause perplexity to the pastor or confessor and prove a source of public scandal if the existence of the impediment becomes known. What is to be done in such a case? If nothing else is required but a renewal of consent, the matter is comparatively easy. But it may happen that an impediment must be removed before the consent can be renewed. The worst trouble is encountered where the renewal of consent offers difficulties which would render revalidation impossible or jeopardize the existing union and the legitimacy of the offspring. If a marriage has been contracted invalidly but with due observance of the prescribed forms, it may be revalidated by the contracting parties renewing their consent. If one party refuses, nothing remains but to heal the marriage "in the root." The former procedure is called simply revalidation, the latter, *sanatio in radice*.

ART. I

SIMPLE REVALIDATION

The Code in the first two canons of this article describes the act of revalidation and in the following determines the different impediments in relation to the consent; in can. 1136 it considers the defect of the original consent, and, finally, in can. 1137, deals with the lack of form.

NATURE OF REVALIDATION

CAN. 1133

§ 1. Ad convalidandum matrimonium irritum ob impedimentum dirimens, requiritur ut cesset vel dispensetur impedimentum et consensum renovet saltem pars impedimenti conscia.

§ 2. Haec renovatio iure ecclesiastico requiritur ad validitatem, etiamsi initio utraque pars consensum praestiterit nec postea revocaverit.

To revalidate a marriage which is invalid because of a diriment impediment, it is required that the impediment cease or be dispensed from, and that the consent be renewed at least by the party who is aware of the impediment.

This renewal of consent is required by ecclesiastical law for validity, even if both parties gave their consent in the beginning and never withdrew it.

RENEWAL OF THE CONSENT

CAN. 1134

Renovatio consensus debet esse novus voluntatis actus in matrimonium quod constet ab initio nullum fuisse.

The renewal of the consent must be a new act of the will ratifying a marriage which is known to have been null from the beginning.

Two conditions are here set forth for the revalidation of an invalidly contracted marriage: removal of the impediment and renewal of the consent.

(1) The *impediment* is understood to be an *invalidating one,* because a merely prohibitive impediment does not render a marriage null. Now such an impediment may *cease* either by itself or by a dispensation. Thus the impediment of immature age ceases after the legal age has been attained, and the impediment of *disparitas cultus,* after one has received Baptism.

An impediment may also be *dispensed* from. Note, however, that some impediments admit of no dispensation (*e.g.,* a previous marriage bond, impotence, consanguinity of the first degree *in linea recta*), whilst from others the Church never dispenses, *e. g.,* the impediment of the priesthood. If an impediment cannot or may not be dispensed from, no revalidation is possible, and the parties must separate, unless, for very special reasons, a friendly cohabitation be permitted. If the impediment may be dispensed from, as in the case especially of minor impediments, revalidation may take place, provided that

(2) The *consent be renewed.* Concerning this procedure our Code, following the now prevalent opinion of the School, declares

(a) That the renewal of the consent, generally speaking, is required *only from the party who is aware of the existing impediment.* For instance, James was sponsor at the baptism of Gemma, who is now his bride. James knows of the impediment, Gemma does not. Therefore according to our canon James must renew the consent, supposing he really and truly gave it when he married

Gemma. This seems very plain. Yet it must be added that not a few authors[1] required the renewal of the consent by both parties. Their argument was based on the theory that "a bilateral contract cannot limp." They supposed that the marital consent given at the so-called marriage was null and could therefore not continue. This argument, though by no means destitute of weight, must now be discarded as contrary to the text of the law. The marital consent once given, and certainly enduring in the party ignorant of the impediment, is supposed to exert its original efficacy and only needs, as it were, to be repeated.

(b) But the renewal is *strictly required* to validate the marriage. Hence *ecclesiastical law* has always insisted upon the renewal if no *sanatio* was applied. Note the term *"iure ecclesiastico,"* which is purposely put into the text. For if the renewal were required by natural law, as the authors mentioned above hold, no dispensation from it could be granted, and a *sanatio* would be almost, if not entirely,[2] impossible. That ecclesiastical law insisted on the necessity of a renewal, is evident from various instructions given by the Roman Court.[3] The intrinsic argument for such necessity lies in the nature of the consent, which is the instrument of marital union, and is rendered fully efficacious only after the impediment has been removed. The Church, therefore, has a right to insist upon a condition which at the same time gives full assurance of the validity of the marriage to the party that suffered from the impediment.

1 Thus Sanchez, l. VIII, disp. 35; Schmalzgrueber, IV, 16, n. 257; Boekhn, IV, 3, n. 38 f.

2 It may be explained by assuming a declaration that the natural law does not oblige under such circumstances. But it is always dangerous to tamper with the natural law.

3 S. O., Jan. 12, 1769; Dec. 9, 1874 (*Coll.*, n. 472 ad II, 5; n. 1427 ad 18).

(c) However, says can. 1134, this renewal must be *a new act of the will* ratifying the marriage that was invalidly contracted. Therefore, James, who contracted an invalid marriage with Gemma, must renew his consent with the express intention of ratifying this marriage with Gemma and no other person. The case becomes more intricate if a man had more than one wife, and the divorce evil, as in Japan,[4] is rampant. If the divorce merely proceeds from an error and not from a positive act of the will or any strict condition, the first marriage contracted in infidelity is valid, and no dispensation for revalidating the second marriage can be granted even after Baptism. It may happen that a wife who is willing to receive Baptism, lives with a husband who claims the right of leaving her in order to contract a new marriage. In such circumstances the wife should not be refused Baptism, but should be told to make every effort to induce her husband to declare that he regards her as his lawful wife. If this is impossible, both are to be left in *bona fide*. If a baptized wife marries an infidel husband, the marriage is null and void on account of the disparity of cult, even though one or both parties are ignorant of the existence of that impediment. If there is at least the outward *semblance of a true marriage,* the dispensation from the impediment of disparity of cult should be applied for and the consent renewed, otherwise a *sanatio* must take place.[5]

Note that the renewal of the consent must be *explicit* and that an implied consent (*viz.,* one contained in the *copula cum affectu maritali*) is not sufficient.[6] Hence the renewal must be an act of the will by which the

4 S. O., March 11, 1868 (*Coll.,* n. 1327).

5 S. O., Dec. 9, 1874 (*Coll.,* n. 1427 ad 18).

6 S. O., June 12, 1850 (*Coll.,* n. 1044).

party says: "I will take thee for my lawful husband (or wife)."[7]

MODE OF RENEWAL AFTER THE IMPEDIMENT IS REMOVED

CAN. 1135

§1. Si impedimentum sit publicum, consensus ab utraque parte renovandus est forma iure praescripta.

§ 2. Si sit occultum et utrique parti notum, satis est ut consensus ab utraque parte renovetur privatim et secreto.

§ 3. Si sit occultum et uni parti ignotum, satis est ut sola pars impedimenti conscia consensum privatim et secreto renovet, dummodo altera in consensu praestito perseveret.

§ 1. If the impediment is *public,* the consent must be renewed by both parties in the form prescribed by law.

§ 2. If the impediment is *occult* and known to both parties, it suffices that the consent be renewed by both privately and in secret.

§ 3. If the impediment is occult and known to only one of the parties, it is enough that the party who is aware of the impediment should renew his consent privately and in secret, provided the other party's consent continues.

The first section treats of *public* impediments. A case solved by the Holy Office may illustrate this law. In Uesküb many Mohammedans had embraced the Catholic faith, but the men conducted themselves outwardly like Muslems, whereas the women were not afraid to profess their faith. Of course the clergy could not assist at the marriages of such persons, and they were consequently invalid for lack of the prescribed form. What was to

[7] How this is to be done see under can. 1135, § 3.

be done? The Holy Office decided that these occult Christians must be admonished to contract marriage according to the rite of the Church, with the renewal of consent, before the pastor and two witnesses, but without solemnities.[8] It is safe to say that can. 1098 may be applied here if the conditions therein mentioned are verified. A public impediment is especially that of disparity of cult, and it is rectified only by the consent of both parties given in the prescribed form.[9] Cases of consanguinity and affinity require the same procedure, except perhaps if both parties were ignorant of the existing impediment.[10]

§ 2 mentions an *occult* impediment known to *both parties,* such as would arise from public honesty or crime and also from disparity of worship in countries where unbelievers are in the majority, and scandal must be avoided. In such circumstances a secret and private renewal would suffice.[11]

§ 3 allows the renewal of consent by *one party* only, if the impediment is occult and unknown to the other. The impediment of crime [12] may enter here, and it may not be amiss to state that the S. C. Poenitentiaria, when granting a dispensation from an occult impediment of a defamatory character (illicit affinity) was wont to add the following clause: *"Certiorata alia parte de nullitate prioris consensus, et quatenus haec certioratio absque gravi periculo fieri nequeat, renovato consensu iuxta regulas a probatis*

8 S. O., Nov. 15, 1882 (*Coll.,* n. 1579); the decisions of S. C. C. quoted by Card. Gasparri refer to a marriage contracted from fear.

9 Bened. XIV, *"Singulari,"* Feb. 9, 1749, § 1.

10 S. O., March 11, 1868 (*Coll.,* n. 1326): *"quoad eos in bona fide soleat."* But the times were troubled.

11 S. O., Jan. 12, 1769 (*Coll.,* n. 472, II, 15): *"sat erit ut inter solos coniuges privatim habeatur renovatio consensus, patefacta tamen, quoad fieri poterit, etiam parti infideli prioris matrimonii nullitate."*

12 Cfr. c. 7, X, IV, 7.

auctoribus traditas." These rules were taken from the moralists,[13] but they are no longer necessary, for the Code says that *private* and secret renewal by the party conscious of the impediment is sufficient, provided, of course, the consent of the other continues. This is the logical consequence of the theory now adopted by the Code that the renewal of the consent is required by ecclesiastical law only, and is, practically speaking, a beneficial ruling.

MARRIAGE NULL FOR WANT OF CONSENT

Can. 1136

§ 1. Matrimonium irritum ob defectum consensus convalidatur, si pars quae non consenserat, iam consentiat, dummodo consensus ab altera parte praestitus perseveret.

§ 2. Si defectus consensus fuerit mere internus, satis est ut pars quae non consenserat, interius consentiat.

§ 3. Si fuerit etiam externus, necesse est consensum etiam exterius manifestare, vel forma iure praescripta, si defectus fuerit publicus, vel alio modo privato et secreto, si fuerit occultus.

A marriage invalid for lack of consent is validated if the party who had not consented, does consent, provided the consent given by the other party continues.

If the want of consent was merely internal, it suffices that the party who did not give his consent give it now interiorly.

If the want of consent was also external, it is necessary that the consent be manifested outwardly; and this outward manifestation must be done in the form prescribed by law if the want of consent was public, whereas a pri-

13 Cfr. Sabetti, *Theol. Moral.*, ed. 1917, p. 955, n. 929.

vate and secret manifestation suffices if the defect was occult.

We will quote an instruction of the Holy Office[14] which illustrates these three sections. Protestants (Calvinists) in Transylvania (Hungary) believed in the dissolubility of marriage and married with that intention. This gave rise to difficulties, which were solved as follows:

(1) If James, a Calvinist, had the intention of marrying Gemma, a Catholic, under the express condition of the dissolubility of marriage, and the want of consent was only interior, or manifested to Gemma alone, he had only to renew the consent in order to revalidate the marriage, because his consent was defective on account of a condition appended interiorly, but affecting the substance of marriage. This is still more the case if fear or intrinsic repugnance would have nullified the internal consent.

(2) But suppose James and Gemma were both Calvinists when they married; that the minister preached the wedding sermon on Math. 19, 9, instructing them that adultery would give them the right to divorce, and that they should have the intention of marrying according to the laws of the country which easily admit divorce; and both parties would marry according to this intention. A marriage contracted with such an explicit condition would be invalid. And here the distinction set forth in § 3 applies: If the defect was *externally* manifested and made known to others, which certainly would be the case here, with the supposition mentioned, because the congregation gathered at the wedding and the magistrates would know of the condition, then the marriage of James and Gemma would have to be contracted in the form prescribed by the Church (supposing they became con-

14 S. O., April 6, 1843 (*Coll.*, n. 965).

verts); if, however, the want of consent was occult, because they married privately without telling anybody of the condition attached, the consent may be renewed privately and in secret. However, in that case it would be necessary to observe the following rule.

MARRIAGE NULL FOR WANT OF THE REQUIRED FORM

Can. 1137

Matrimonium nullum ob defectum formae, ut validum fiat, contrahi denuo debet legitima forma.

A marriage null for want of form, to become valid, must be contracted again according to the prescribed form.

Therefore, if James became a Catholic and Gemma remained a Protestant, the marriage would have to be contracted again before the Catholic pastor and two witnesses.[15]

The same rule holds if two Catholic parties were married without observing the prescribed form. And from this condition a dispensation is granted only for very particular reasons, *e.g.*, if many marriages are to be validated which for reasons of persecution or disturbed conditions,[16] were contracted privately. In this case can. 1098 may also be applied.

15 Letter of Pius VIII, of March 25, 1830; Secret. Status, March 27, 1830 (*Coll.*, n. 811).

16 To the Vicar Apostolic of Oceania, S. O., April 6, 1843 (*Coll.*, n. 965).

ART. II

REVALIDATION IN RADICE

NATURE OF THE SANATIO

CAN. 1138

§ 1. Matrimonii in radice sanatio est eiusdem convalidatio, secumferens, praeter dispensationem vel cessationem impedimenti, dispensationem a lege de renovando consensu, et retrotractionem, per fictionem iuris, circa effectus canonicos, ad praeteritum.

§ 2. Convalidatio fit a momento concessionis gratiae; retrotractio vero intelligitur facta ad matrimonii initium, nisi aliud expresse caveatur.

§ 3. Dispensatio a lege de renovando consensu concedi etiam potest vel una tantum vel utraque parte inscia.

§ 1. The *sanatio* of a marriage *in radice* is its revalidation, implying besides a dispensation from, or the cessation of, the impediment, the dispensation from the (ecclesiastical) obligation of renewing the consent, and, by a fiction of law, retroaction as regards the canonical effects.

§ 2. Revalidation takes place at the moment the favor is granted; the retroaction is understood to reach back to the moment of the marriage, unless the contrary be stated.

§ 3. The dispensation from the obligation of renewing the consent may be granted without the knowledge of one or of either party.

A case proposed to the S. C. Poenitentiaria may illustrate the text.[17] James and Gemma married legally in

17 *Anal. Eccl.*, 1900, t. VIII, p. 305 f.

1867, in the diocese of Paris, but James proved a bad husband, wherefore Gemma, after having obtained a civil divorce, went to Switzerland and before the civil magistrate married John, a nominal Catholic, in 1872. After some years James died and Gemma endeavored to induce John to renew the consent before the Church authorities, but he refused, declaring that the civil marriage was sufficient for him. Nothing was left for the woman to do but to ask for a *sanatio in radice*. This was granted by the aforesaid tribunal, April 25, 1890, with the significant clause, however, that the offspring born from adultery should not be benefitted by the legitimation. Hence the offspring born to Gemma and John whilst James was still alive, was not declared legitimate. But all children born after James' death, say 1875, to the year 1890, shared in the canonical effects of the *sanatio*.

Here we have: (a) a *removal of the impediment,* which is one of the natural law, *viz.,* that of the marriage tie (*ligaminis*). This ceased by the death of James, in 1875. Thus also may a dispensation remove an impediment which the ecclesiastical law has established, supposing, of course, the Holy See is wont to grant it.

(b) There is also a *dispensation from the renewal of the consent,* which John flatly refused to give. Here again note the fact that the renewal of the consent is required not by the natural, but by an ecclesiastical law, from which, therefore, the Church, as in matters subject to her dominion, may dispense, provided, of course, as will be seen under can. 1140, that this consent was really a marital consent and that it continues.

(c) Finally there is the *retroaction* as regards canonical effects. These extend to the moment the marriage was invalidly contracted. But our case is a peculiar one, which is the reason why we chose it. We have not a

complete and absolute *sanatio,* otherwise its effects would reach back to the year 1872, when Gemma married John, whereas the sacred tribunal extended the effects of the *sanatio* only to the time when James died, or, as we presumed, to the year 1875. If there had been only an ecclesiastical impediment between James and Gemma, and no second marriage, the effects of the *sanatio* would have reached back to 1868. The *effects* of revalidation then are: dispensation from an impediment of ecclesiastical law, validity of the marriage, and legitimation of the offspring.[18]

§ 2 determines the *moment* from which the marriage is revalidated. It is the moment when the favor has been granted — *a die datae,* and not the date of the execution of the rescript. For a genuine *sanatio* does not require a renewal of the consent, but depends entirely upon the free will of the grantor. But note that the grantor does not say — as some have foolishly understood — that the marriage is valid from the moment it was contracted. To impute such an impossible and ridiculous assertion or supposition to the Roman Congregation and tribunals is more than common sense can tolerate. Therefore the validity of the marriage once invalidly contracted, begins the moment — *ex nunc* — the Cardinal Prefect puts his signature to the decree of revalidation. Entirely different from this genuine assertion is the other that the law feigns or assumes by a *fictio iuris* the validity of the marriage from the time it was first, though invalidly, contracted. For this fiction, as in civil law, almost exclusively concerns the legal effects of the legitimation of offspring. Concerning these the *sanatio* works *ex tunc, i.e.,* from the

18 Cfr. can. 1116 f. But cardinals and bishops would be excepted from the effects on account of the "*convalidatum*" in can. 1116, which is the general term also for *sanatio in radice.*

moment of the first celebration. But the Code adds: "Unless otherwise expressly provided." Thus we see in the decision of the S. Poenitentiaria quoted above that the adulterine offspring was expressly excluded.

§ 3 mentions the *extent of ignorance,* saying that a dispensation from the renewal of the consent may be given if both parties are unconscious of the existence of the impediment, nay of the fact that a *sanatio* was given. For not only the parties themselves, but Ordinaries and confessors may ask for such a dispensation. Thus many such dispensations were given for France after the revolution, for the diocese of Treves, and for Japan.[19]

WHEN A SANATIO IN RADICE IS POSSIBLE

CAN. 1139

§ 1. Quodlibet matrimonium initum cum utriusque partis consensu naturaliter sufficiente, sed iuridice inefficaci ob dirimens impedimentum iuris ecclesiastici vel ob defectum legitimae formae, potest in radice sanari, dummodo consensus perseveret.

§ 2. Matrimonium vero contractum cum impedimento iuris naturalis vel divini, etiamsi postea impedimentum cessaverit, Ecclesia non sanat in radice, ne a momento quidem cessationis impedimenti.

§ 1. Any marriage contracted in spite of an impediment of ecclesiastical law, or for lack of the legal form, may be revalidated *in radice,* provided a naturally sufficient, though juridically ineffective consent was given and continues.

Case: Gemma, not baptized but held to be a Catholic

19 Pius VII, Aug. 14, 1801; Feb. 7, 1809; Pius VIII, March 25, 1830; Secret. Status, March 27, 1830; S. O., March 11, 1868 (*Coll.,* nn. 811, 1326).

by all, married James, a Catholic, in the form prescribed by the Church. Afterwards she secretly approaches the priest to whom she reveals her condition (of not being baptized), demands Baptism immediately, which is conferred, and asks that the secret be kept, especially towards her husband.[20] This marriage was revalidated, because

(a) The impediment (disparity of worship) was of ecclesiastical law, purely;

(b) The *consent* was given as for marriage, which is evident from the fact that the parties were married in church, and it continues, for she asks for Baptism;

(c) The consent was juridically ineffective, because the impediment rendered it impossible for it to produce the marriage union. Of course a *merely fornicarious* consent could not be looked upon as a marital consent. But that a consent was fornicarious if the semblance of marriage was observed, would require strong proof. It would not be enough that the party would like to get a divorce, or that one of them asked for a decree of separation. But if one of them, or both, would obtain a decree of separation under the plea of nullity, the semblance of a marriage could hardly be upheld.[21]

§ 2. A *marriage contracted with an impediment of the natural or divine law, even if the impediment afterwards disappears, the Church does not revalidate in radice, not even from the moment the impediment has ceased.*

Card. Gasparri refers to a case solved by the Holy Office.[22] James (a non-Catholic) lived in concubinage for five years, until 1898, when he contracted a civil

20 S. O., Aug. 22, 1906 ad IV (Covington; cfr. *Anal. Eccl.*, t. XV, p. 8 f.).

21 Wernz, *l. c.*, IV, Vol. 2, p. 566, n. 659.

22 March 8, 1900 (*Coll.*, n. 2078); more general, S. O., March 2, 1904 (*Coll.*, n. 2188).

marriage with his concubine. Two children were born before that date, and one of them died soon after birth, March 29, 1896. James had, in 1896, to undergo an operation, which rendered him completely impotent.[23] Internal marital consent, and, after 1898, also the semblance and species of marriage seemed to exist and continue. The Holy Office decided that no revalidation *in radice* was possible because the natural impediment of impotence was in the way. To inquire further into the wherefor would conjure up the controversy concerning the necessity of the renewal of consent. But we cannot help observing that the answer of the S. Poenit. of April 25, 1890, alleged above, seems to be contrary to can. 1139, § 2, at least in its general wording: "*Ecclesia non sanat.*" We understood that decision as a partial but true *sanatio*.[24]

WHEN RENEWAL OF CONSENT IS IMPOSSIBLE

Can. 1140

§ 1. Si in utraque vel alterutra parte deficiat consensus, matrimonium nequit sanari in radice, sive consensus ab initio defuerit, sive ab initio praestitus, postea fuerit revocatus.

§ 2. Quod si consensus ab initio quidem defuerit, sed postea praestitus fuerit, sanatio concedi potest a momento praestiti consensus.

§ 1. If the consent of one or both parties is wanting, the marriage cannot be revalidated *in radice*, regardless

23 Both testicles were removed (*utroque teste*).

24 Wernz, *l. c.*, IV, Vol. 2, p. 561, n. 657, perceived the difficulty, and tried to solve it by the expedient that the *sanatio* was *impropria et relativa*, which is true to some extent, but it was invalid from the moment the *impedimentum ligaminis* ceased, which is denied by our canon. No wonder the decision of the S. Poenit. is not quoted by Card. Gasparri.

of whether the consent was wanting from the beginning, or was given at the beginning and afterwards withdrawn.

§ 2. If the consent was wanting in the beginning, but given later, the *sanatio* may be granted from the moment the consent was given.

The Bishop of Covington had asked the Holy Office for an explanation concerning the faculties granted to the bishops of the U. S.: May the faculty of revalidating a marriage *in radice* be applied if both parties know of the nullity of the marriage, but one of them cannot be induced to renew the consent, and if both parties are unconscious of the nullity of their marriage, provided one of them is afterwards informed of the *sanatio* and its effect? The answer to the first question was: *Negative,* unless it is evident that a true consent was given under the species of matrimony and that this consent continues on both sides. The answer to the second question was merely: *Negative.*[25] From this it appears that a positive remonstrance against the renewal of the consent amounts to an interruption of the same. Note the phrase, *species matrimonii,* which may be verified, not only when marriage is contracted with due regard to the ecclesiastical form, but also when the conditions of a true marriage are verified; in other words, when the consent given was a truly marital one, and both parties were regarded as husband and wife.[26] It is difficult to understand how James and Gemma may have a true marital consent, though both are aware of the nullity of their marriage. But we suppose they are either unaware of the effect of an invalidating impediment, or are not convinced of the

25 S. O., Aug. 22, 1906 (*Anal. Eccl.,* t. XV, p. 8).

26 S. O., Dec. 9, 1874 ad 18 (*Coll.,* n. 1427); Bened. XIV, *De Syn. Dioec.,* XIII, 20, 8; Id., *Quaestiones Canonicae,* Quaestio 174.

reality of that effect, or do not believe in the power of the Church to establish impediments.[27] Faulty education or lack of opportunity for gathering information may also be a cause of ignorance. But be this as it may, a marital consent must be supposed and must precede, otherwise no *sanatio* is possible, for what does not exist cannot be revived. Wherefore, as § 2 says, revalidation reaches back only to the moment when the marital consent was given.

BY WHOM A SANATIO MAY BE GRANTED

CAN. 1141

Sanatio in radice concedi unice potest ab Apostolica Sede.

A *sanatio in radice* may be granted only by the Apostolic See. No direct traces of this power are extant before the fourteenth century. Boniface VIII seems to have been the first pope who granted such a dispensation. After the Council of Trent the practice became more frequent, especially in countries (France, Japan, etc.) with turbulent conditions.[28]

Although this power is reserved to the Pope, he may and does communicate it to others. Our *Ordinaries* have it in virtue of the decree of the S. C. Consistorialis of April 25, 1918, which says that they may revalidate marriages invalidly contracted on account of a minor diriment impediment.[29] A decree of the S. C. Consistorialis, of Aug. 2, 1918, extends this faculty to marriages invalidly contracted *ob impedimenta maiora*.[30] How long these faculties will be continued (they were granted "*praesentis belli causa*") is a question which we are unable to answer; but see what is said under can. 1048.

27 Wernz, *l. c.*, Vol. 2, p. 563.
28 Wernz, *l. c.*, IV, Vol. 2, p. 556 f.
29 *A. Ap. S.*, X, 190 ff.
30 *A. Ap. S.*, X, 363 f.

CHAPTER XII

SECOND MARRIAGES

CAN. 1142

Licet casta viduitas honorabilior sit, secundae tamen et ulteriores nuptiae validae et licitae sunt, firmo praescripto can. 1069, § 2.

CAN. 1143

Mulier cui semel benedictio sollemnis data sit, nequit in subsequentibus nuptiis eam iterum accipere.

Although a chaste widowhood is more honorable, second and further marriages are valid and lawful, provided the former marriage has been duly dissolved and the free status proved.

A woman who has once received the solemn nuptial blessing cannot receive it again.

In the first eight or nine centuries second marriages were not favored. The Penitential Books[1] are rather severe in meting out public penances for "bigamy," as second marriage was called. There is a foundation for this idea in Holy Writ,[2] which, while it does not command, strongly counsels the faithful to abstain from a second marriage because of the typical union between the

1 Wasserschleben, *l. c.*, pp. 148, 179, etc.

2 Rom. 7, 3; 1 Cor. 7, 8, 39 f; 1 Tim. 5, 3 ff. The Montanists, Novatians and Waldenses (cfr. Innoc. III, "*Eius exemplo,*" Dec. 18, 1208) made it a command; some early writers, like Irenaeus and Origen, use rather strong language against second marriage.

Word of God and His Church. Therefore, also, a higher degree of perfection was attributed to honorable widowhood. As to widowers, title 21 of book I of the Decretals debars them from the sacred ministry, and the irregularity arising from bigamy is still a law.[3] However, the former penalties have been omitted from the Decretals, which permit second marriages, provided the former marriage tie has been duly dissolved and its dissolution proved.[4] No definite time is prescribed for mourning by ecclesiastical law, as the Roman law[5] enjoined and some modern civil codes[6] still maintain.

Can. 1143, then, rules, in accordance with the Decretals,[7] that the *solemn nuptial blessing* is not to be imparted to a widow — not a widower — who has received the same in a former marriage. Note that what is here forbidden is only the solemn nuptial blessing, which is given during Mass (whether *pro sponso et sponsa* or in the Mass of the Day) with the proper orations and special prayers; not the blessing of the Roman Ritual.[8] This solemn blessing may and should be imparted even to a widow, if she has not received it at her first marriage, even though she may be "in a family way."[9] For the purpose of this blessing (a mere sacramental)[10] is to

3 Cfr. can. 984.

4 C. 2, X, IV, 21; how it is proved see under canons 1031 and 1069.

5 Cod. VI, 40; Nov. 22, c. 43 f.

6 The Swiss Code, art. 103, requires 300 days.

7 Cc. 1, 3, X, IV, 21; for the Greeks also Bened. XIV "*Etsi pastoralis*," May 26, 1742.

8 S. C. P. F., Sept. 21, 1843 (*Coll.*, n. 971); S. O., Aug. 31, 1881 (*Coll.*, n. 1557); S. Rit. C., June 30, 1896 ad VI (*Decreta Auth.*, n. 2923).

9 S. C. P. F., July 21, 1943 ad 3 (*Coll.*, n. 932).

10 We hardly believe the statement to be correct (Leitner, *l. c.*, p. 527, ed. 1) that the couple, if they do not receive the nuptial blessing, are deprived of the graces flowing from the Sacrament. The sacramental grace is attached to the Sacrament, and the latter cannot be separated from the contract. Hence, supposing there is no *obex* to the Sacrament, the grace is received by valid consent.

convey, we might say in a tangible way, the necessary graces for the fulfillment of a mother's most important duties. It is for this reason also that the wife is chiefly and peculiarly mentioned in those prayers.

MATRIMONIAL TRIALS
(Book IV, Title XX, Can. 1960-1992)

CHAPTER I

THE COMPETENT COURT

COMPETENCY OF THE CHURCH

Can. 1960

Causae matrimoniales inter baptizatos iure proprio et exclusivo ad iudicem ecclesiasticum spectant.

Can. 1961

Causae de effectibus matrimonii mere civilibus, si principaliter agantur, pertinent ad civilem magistratum ad normam can. 1016; sed si incidenter et accessorie, possunt etiam a iudice ecclesiastico ex propria potestate cognosci ac definiri.

Matrimonial cases between baptized persons belong by proper and exclusive right to the ecclesiastical judge.

Cases which concern merely the civil effects of marriage, if these are the principal cause at issue, belong to the civil court; but if the civil effects are only incidental and accessory, they may be taken cognizance of and settled by the ecclesiastical judge in virtue of his inherent power.

To what has been said under Can. 1016 little remains to be added here. The settling of controversies concerning

a given subject certainly belongs to him to whom the subject itself belongs. As Christian marriage is a strictly sacred thing, a sacrament, matrimonial trials, because of their intimate connection with the sacramental dignity, must be brought before the ecclesiastical judge. For "whatever in things human is of a sacred character, whatever belongs either of its own nature or by reason of the end to which it is referred, to the salvation of souls or the worship of God, is subject to the power and judgment of the Church."[1] This right belongs *properly* to the Church because marriage between baptized persons is properly called a sacred thing and the Church does not borrow this authority from the civil power, but derives it from her divine origin and constitution.[2] It is the *exclusive* right of the Church because what belongs to her by divine institution she cannot let slip from her jurisdiction, nor can she divide her power with another, it being as indivisible as sovereignty. Of course, conflicts may and do arise between the ecclesiastical and the civil power, in as much as the one defends and upholds what the other rejects and invalidates, in as much as the civil power spurns and punishes what the Church blesses and sanctifies, in as much as the State grants civil effects to a union which is declared incapable of obtaining civil and spiritual effects by the Church.[3] Such conflicts arise either from misunderstanding or failure to realize the innate power of the Church. In itself such a contradiction should be impossible, since God is the author of both powers, human and divine.[4] By good will and mutual confidence, and especially by the conclusion of treaties founded on mutual trust and loyalty — not mere "scraps

1 Leo XIII, "*Immortale Dei*," Nov. 1, 1885 (Wynne, *Great Encycl.*, p. 115).

2 *Trid.*, sess. 24, can. 12, *de mat.*

3 S. O., July 6, 1817 (*Coll.*, n. 725).

4 Leo XIII, "*Immortale Dei*," *l. c.*

of paper"— such conflicts and misgivings can mostly be avoided.

But the question arises: What is the duty of *Catholic magistrates and lawyers when they act as judges or attorneys in matrimonial cases which require a bill of divorce?* This question was settled by the Holy Office as follows: Considering the serious circumstances of things, times and places (in France), it may be tolerated that civil magistrates and attorneys pronounce sentence or defend in matrimonial cases, provided they openly profess the Catholic doctrine (as proposed above), never pronounce, solicit or provoke a sentence repugnant to divine or ecclesiastical law, and in difficult cases have recourse to their Ordinary or to the Apostolic Penitentiary.[5] As was natural, French interpreters of this decision tried to give it a most lenient construction. Hence the Holy Office was again approached: Does a judge comply with the condition set forth above if he mentally abstracts from the validity of the marriage according to ecclesiastical laws and simply applies the civil law and pronounces a divorce, though he firmly intends to break the union only as far as civil effects and the civil contract are concerned? In other words: Is a judge allowed to make a mental restriction, which inwardly conforms to the doctrine and practice of the Church, but outwardly and in fact contradicts the same? The answer of course was, "No."[6] The same decision says that neither could the mayor, under the same restriction, pronounce a divorce if the marriage was ecclesiastically valid, nor allow the

5 S. O., June 25, 1885 (*Coll.*, n. 1636).

6 S. O., May 27, 1886 (*Coll., l. c.*). Concerning marriages of such as are not under Catholic jurisdiction, the Church abstains from judging them. However we believe a Catholic judge would be allowed to pronounce sentence on such a marriage, because no strictly prohibitive law now exists with regard to them.

divorced party to remarry civilly. The consequence is — also for Catholic judges and attorneys in the United States and elsewhere — that they are never allowed to pronounce a sentence of divorce upon a validly married Catholic couple as long as the Church has not declared their union invalid. If the ecclesiastical authorities have rendered a verdict of invalidity, the civil judge may pronounce sentence of divorce and a Catholic lawyer may defend the case. The same rule applies to separation, which also, according to Catholic doctrine and as expressly stated in the above mentioned decree of the Holy Office, belongs to the Church. To the latter is furthermore reserved, at least *a priori,* the legitimacy of offspring.

Can. 1961 determines, first and above all, *what the civil magistrate may do.* He may decide as to the *civil effects* of marriage, such as questions concerning property, civil rank and name, inheritance and similar purely worldly affairs.[7] But the text says: *si principaliter agantur.* This means that the civil effects, for instance, concerning property, must be the main question at issue. If the civil effects are concerned in a suit only incidentally and accessorily, whilst the principal and main quarrel concerns either the validity of the marriage, or separation, or the legitimacy of the children, then the ecclesiastical judge, in his capacity as such, is entitled to decide. For the rule is that the accessory follows the principal.[8] It stands to reason, however, that the ecclesiastical judge should either have his sentence ratified and sanctioned by the civil court, or abstain entirely from passing judgment upon civil matters, for the reason that he cannot compel acknowledgment of his sentence by the civil court.

7 Cfr. cc. 1, 3, 5, X, IV, 17 (hereditary quarrels); cc. 3, 5, 7, X, IV, 20 (dowry).

8 Reg. 42 in 6°: "*Accessorium naturam sequi congruit principalis.*"

THE ROMAN COURT

CAN. 1962

Causas matrimoniales ad eos spectantes de quibus in can. 1557, § 1, n. 1, illa Sacra Congregatio vel illud Tribunal aut specialis ea Commissio exclusive cognoscet, cui eas toties quoties Summus Pontifex delegaverit; causas dispensationis super matrimonio rato et non consummato, Sacra Congregatio de disciplina Sacramentorum; causas vero quae referuntur ad privilegium Paulinum, Sacra Congregatio S. Officii.

CAN. 1963

§ 1. Quare nullus iudex inferior potest processum in causis dispensationis super rato instruere, nisi Sedes Apostolica facultatem eidem fecerit.

§ 2. Si tamen iudex competens auctoritate propria iudicium peregerit de matrimonio nullo ex capite impotentiae et ex eo, non impotentiae, sed nondum consummati matrimonii emerserit probatio, omnia acta ad Sacram Congregationem transmittantur, quae iis uti poterit ad sententiam super rato et non consummato ferendam.

Leaving aside the first clause of can. 1962, which decrees that the *matrimonial cases of sovereigns and their lawful heirs are reserved to the Holy See,*[9] or to the S. Congregation or a special Commission exclusively and purposely assigned by the Pontiff, we note:

1. The competent Roman Court is the *S. Congregation of the Sacraments,* whenever there is question of dispensing from a ratified but not yet consummated mar-

[9] S. C. Sacr., March 7, 1910 (*A. Ap. S.*, II, 147): all dispensations from diriment as well as prohibitive impediments are reserved.

riage. This court is so exclusively competent that, as can. 1963 rules, no inferior judge, hence no local Ordinary, can institute a canonical trial in such cases unless the Holy See has granted faculties for that purpose. Local Ordinaries may receive this faculty from the Holy See (S. C. Sacr.) either habitually or for single cases. But it is not given by the decree "*Proxima sacra,*" April 25, 1918, nor by that of Aug. 25, 1918. And since the former faculties have ceased, the Ordinaries must be expressly reinvested with this faculty. When they receive the faculty from the Holy See, it may be well to look up can. 199, which says that jurisdictional power granted by the Holy See may be subdelegated, unless it is granted for personal reasons. If personal reasons are excluded, the Ordinary may subdelegate the trial to another ecclesiastic.[10]

However, the local Ordinaries may indirectly be concerned and empowered to institute a trial, which may lead to a sentence of a dispensation from a ratified marriage. This happens when a case of *impotency,* which the Ordinary is entitled to take cognizance of in virtue of his own authority, is brought before him. If the physicians and nurses and other witnesses required in that case are unable to prove the existence of impotency, but merely the fact that the marriage had not been consummated, the minutes must be sent to the S. Congregation, which may make use of the same to pass judgment concerning the *matrimonium ratum non consummatum.* The S. Congregation may, *iure proprio, i. e.,* without special commission

10 If the Ordinary has no faculties, he may refer the case directly to the S. C. dei Sacramenti, Cancellaria Apostolica, Corso Vittorio Emmanuele, Roma, Italy. If he sends the case to his agent, the letter must be well sealed and not opened by the agent, who has merely to forward it to the Secretary or the Card. Prefect of the S. C. (S. C. Consist., Nov. 25, 1908; *A. Ap. S.,* I, 211).

from the Pope, transmit the case to the S. Romana Rota, which shall investigate the fact of non-consummation.[11] Of course, the S. R. Rota cannot grant a dispensation *super matrimonio rato,* as this is strictly reserved to the S. Congregation of the Sacraments. When sending in the *acta* bearing on the *factum non-consummationis,* the Ordinary should add a petition based on canonical, or at least solid, reasons why the dispensation is asked.[12]

2. The second Congregation mentioned in can. 1962 is the *Holy Office.* But here only the Pauline Privilege is concerned, whilst disparity of worship and mixed religion[13] are omitted. The reason for this omission is that only the most exclusive matters are referred to in our canon. Besides, as noted under can. 1121, § 2, there is no question of a real dispensation in the matter of the privilege of faith, but only of a declaration, and such no Ordinary is allowed to give. Hence if there is a doubt whether the interpellation must be made, recourse should be had to the Holy Office.

THE DIOCESAN COURT

Can. 1964

In aliis causis matrimonialibus iudex competens est iudex loci in quo matrimonium celebratum est aut in quo pars conventa vel, si una sit acatholica, pars catholica domicilium vel quasi-domicilium habet.

In other matrimonial cases the competent judge is the judge of the respective place (or diocese) where the marriage was celebrated, or where the defendant has his domicile or quasi-domicile, or, if one of the parties is a

11 S. C. Cons., Jan. 28, 1909 (*A. Ap. S.,* I, 213).

12 S. O., Aug. 6, 1890, n. 7 (*Coll. P. F.,* n. 1737).

13 Cfr. can. 247, § 3.

non-Catholic, where the Catholic party has his or her domicile or quasi-domicile.

The phrase "*in other cases*" signifies that trials of nullity arising either from one of the twelve diriment impediments or from defective consent or non-observance of the prescribed form, may all be brought before the local ecclesiastical judge, who shall also hear cases concerning the prohibitive impediments, separation, and legitimation of offspring.

By the term *judge* is understood the Ordinary of the diocese, because he is the *iudex ordinarius* of the place.[14] *Abbates Nullius* are not excluded from acting as judges in matrimonial matters.[15] The *Vicar-General*[16] as well as the *Vicar-Capitular* or Administrator are also entitled to conduct such a trial. But inferior prelates, no matter how many titles and insignia they may have, do not fall under the category of Ordinaries and therefore have no right to try such cases.

The question, who is the Ordinary, is settled by the Code when it states the two reasons which decide competency. The first is the *ratio contractus*[17] or the place where the marriage was celebrated, because marriage is a species of contract. This reason may be invoked at any time, for the fact of having contracted marriage in a certain place remains. The second reason is the *domicile* of the defendant or of the *pars conventa,* according to the well-known axiom: "*Actor sequitur forum rei.*" Equal to the domicile in our case is the *quasi-domicile,* and no preference may be claimed. Otherwise the wife gener-

14 *Trid.,* sess. 24, c. 20, *de ref.*

15 Can. 323, C. 12, X, V, 31, mentions abbots who usurped a power not their own, but they are not *abbates nullius.* Leitner, *l. c.,* p. 550, is wrong in excluding these abbots from matrimonial trials; cfr. Feije, *l. c.,* n. 586, p. 474.

16 Concerning the marriage of conscience, see can. 1104.

17 C. 20, X, II, 20.

ally follows the forum or court of her husband according to our Code.[18] But the Instruction of 1883 makes a two-fold exception, which is admitted, at least impliedly, by the Code.[19] If the husband and wife have been *legitimately separated,* and the former wishes to petition for annullment of the marriage, he must do so before the Ordinary in whose diocese the wife has her domicile or quasi-domicile, because by a separation she regains or obtains her own domicile. If the wife demands the annullment, she must do so before the Ordinary in whose diocese the husband has his domicile. Hence in case of a separation the old principle holds: *Actor sequitur reum.*[20] The other exception is *desertion.* If the husband maliciously deserts his wife, she may institute proceedings before the bishop in whose diocese she has her domicile. But if she deserts her husband, she must follow the court of the husband, or, in other words, apply to the bishop in whose diocese the husband has his domicile or quasi-domicile.[21] Note that the monthly stay is not mentioned here and may therefore not be applied.

As to *mixed marriages* — and this holds good of disparity of worship as well as of mixed marriages properly so-called — the Code states that the domicile or quasi-domicile of the *Catholic party* decides who is the competent judge. Therefore the Ordinary in whose diocese the Catholic party has a domicile, is also entitled to judge concerning the free status of a heretical party who has been divorced by a sentence of the civil court. But if the non-Catholic party had been received into the Church, the domicile of the husband would determine the competency of the Ordinary.[22]

18 Cfr. can. 93.

19 Inst. 1883 (*Coll. P. F.*, n. 1587), for the U. S.

20 Cfr. cc. 5, 8, X, II, 2.

21 See Smith, *Marriage Process,* p. 51.

22 S. O., June 30, 1892 (*Coll.*, n. 1799); June 23, 1903 (*Anal. Eccl.*, t. 11, 381).

After the canonical or *judicial citation* has been served on the parties, no change of domicile or quasi-domicile by either of them shall in any way change the competency of the judge so chosen or established.[23] Hence, for instance, though the parties, or one of them, would leave the diocese of St. Joseph after having been duly summoned, and reside in the diocese of Kansas City, the Ordinary of St. Joseph would have to finish the trial in the first instance, until a sentence were pronounced.

WANT OF CONSENT

CAN. 1965

Si matrimonium accusatur ex defectu consensus, curet ante omnia iudex ut monitionibus opportunis partem, cuius consensus deesse affirmatur, ad consensum renovandum inducat; si ex defectu formae substantialis vel ex impedimento dirimenti quod dispensari potest et solet, partes inducere studeat ad consensum in forma legitima renovandum vel ad dispensationem petendam.

The Code now exhorts the judge to endeavor to bring about a peaceful settlement before legal procedure is instituted. First, of course, he should ascertain the cause of the dispute. If the point of dissension is *lack of consent,* for instance, error, compulsion or fear, or conditional consent, which causes the parties to have the marriage declared invalid, the judge should try to induce the party whose consent is asserted to have been deficient to renew the same. For this purpose he may await a moment when the parties are less excited and more favorably inclined toward each other.[24] Besides, the scandal they give may be held up to them, etc.

23 Instr. of 1883, n. 2.

24 S. O., Dec. 9, 1874 (*Coll.*, n. 1427, ad. 18): *opportunitate capta alicuius momenti effusionis benevolentiae.*

If the reason for having the marriage declared invalid arises *from want of the prescribed form or from a diriment impediment* from which a dispensation can be and generally is granted, the judge should make every effort to have the parties renew their consent in the form prescribed or ask for the necessary dispensation. Of course, if the form was not observed, the consent was invalid, and must therefore be renewed in the presence of the pastor or Ordinary or a delegated priest and two witnesses. If the marriage was invalid, not by reason of lack of form, but because of a diriment impediment, the parties should be urged to ask for a dispensation. If they are willing to do so, and the Ordinary has the faculty to grant the same, it should be applied there and then. If he has not the faculty, the parties must be told to wait until it is obtained, and in the meanwhile to abstain from conjugal intercourse. This would be the easiest way to settle the case. If only one party knows of the impediment, the chapter on revalidation must be looked up. If they insist upon an ecclesiastical trial, this must be conducted according to the rules that follow.

CHAPTER II

CONSTITUTION OF THE TRIBUNAL

THE JUDGE

CAN. 1966

Firmo praescripto can. 1576, § 1, n. 1, unicus est iudex instructor in inquisitione pro dispensatione super matrimonio rato et non consummato.

With the sole exception of the *matrimonium ratum et non consummatum,* which requires only one judge to conduct the investigation, a *collegiate tribunal of three judges* must be set up *for every matrimonial case or trial,* and no privilege or custom may be claimed to offset this law.[1] Henceforth every diocesan court should have a board of three judges for matrimonial trials. They may either be chosen for each case as it comes up for decision, or elected for a certain term or *turnus* from the synodal judges, *i. e.,* those chosen at the synod.[2] The reason for constituting a collegiate tribunal is evidently to be sought in greater efficiency and impartiality and in the seriousness of the matter.[3] How these judges are to proceed is explained in can. 205–207.[4] We will only mention that they must act as a body and no one is allowed to decide the case without the co-operation of the others.

1 Thus can. 1576, § 1, n. 1, which simply says *causae matrimonii,* matrimonial cases, not only such as touch the marriage tie — as one might be led to infer from Woywod's translation — but all, even those of simple separation.

2 Can. 1576, § 4.

3 C. 20, X, I, 29.

4 See Vol. II, p. 185 ff.

THE DEFENSOR VINCULI

CAN. 1967

Sive agatur de nullitate matrimonii, sive de probandis inconsummatione et causis ad dispensandum super rato, citari debet defensor vinculi matrimonialis, ad normam can. 1586.

Each diocese must have a *defensor vinculi,* who should be summoned in cases which concern either the nullity of a marriage or the gathering of proofs for non-consummation and dispensation from a marriage ratified but not consummated. This rule had been inculcated by Benedict XIV, who emphatically insisted on such a defender being chosen by the Ordinary of each diocese. His qualities are described in the same Constitution. He must be well versed in the law and of acknowledged probity. The bishop may remove him and appoint another in his place if he is prevented from taking charge of any case.[5] The *defensor* must make oath into the hands of the bishop to perform his duties faithfully, but this need be done only once, namely, when he enters upon his office.[6]

DUTIES OF THE DEFENSOR VINCULI

CAN. 1968

Defensoris vinculi est:

1.° Examini partium, testium et peritorum adesse; exhibere iudici interrogatoria clausa et obsignata, in actu examinis a iudice aperienda, et partibus aut testibus proponenda; novas interrogationes, ab examine emergentes, iudici suggerere;

5 *"Dei miseratione,"* Nov. 3, 1741, § 6; see can. 1589.

6 Can. 364. The Instruction of 1883, n. 10, requires that the oath be given by touching the book of the Gospels.

2.° Articulos a partibus propositos perpendere, eisque, quatenus opus sit, contradicere; documenta a partibus exhibita recognoscere;

3.° Animadversiones contra matrimonii nullitatem ac probationes pro validitate aut pro consummatione matrimonii scribere et allegare, eaque omnia deducere, quae ad matrimonium tuendum utilia censuerit.

1. It is the duty of the *defensor vinculi* to be present at the examination of the parties, witnesses, and experts; to present to the judges in a closed and sealed envelope the questions to be opened by them in the act of examination, and to be proposed to the parties and witnesses; and to suggest to the judges new questions which may arise from the cross-examination.

2. He has to weigh the arguments proposed by the parties, and if necessary to contradict them, and to review the papers offered.

3. He is to set down in writing and to point out observations against the nullity of the marriage and in favor of its validity or consummation, and in general to make use of all lawful means which he deems conducive for the defence of the marriage bond.

RIGHTS OF THE DEFENSOR VINCULI

CAN. 1969

Defensori vinculi ius esto:

1.° Semper et quolibet causae momento acta processus, etsi nondum publicati, invisere; novos terminos ad scripta perficienda flagitare, prudenti iudicis arbitrio prorogandos;

2.° De omnibus probationibus vel allegationibus ita certiorem fieri, ut contradicendi facultate uti possit;

3.° Petere ut alii testes inducantur vel iidem iterum examini subiiciantur, processu etiam absoluto vel publicato, novasque animadversiones edere;

4.° Exigere ut alia acta, quae ipse suggesserit, conficiantur, nisi tribunal unanimi suffragio dissentiat.

1. He is entitled to inspect, at any stage of the proceedings, the minutes of the trial, even though they have not yet been published, and to demand prorogation, which is to be granted according to the discretion of the judge, in order to complete his records.

2. He is entitled to be informed of all the proofs and allegations made, in order to be able to contradict them.

3. He may demand that new witnesses be introduced, or that such as have already been on the witness-stand be re-examined, even though the minutes of the trial have been completed and published; and he may also make new observations.

4. Finally he may demand that other acts, suggested by himself, be drawn up, unless the tribunal by a unanimous vote objects to this demand.

It is necessary to add that the defender must be summoned to all judicial proceedings and sessions of the court, otherwise there is danger of the acts being null and void.[7] How carefully everything should be observed that pertains to the office and rights of the defender, is apparent from many cases decided in Rome. In one instance [8] the acts were attacked and had to be revalidated on several points because the defender had not delivered to the judge or notary the points of examination in a closed and sealed envelope, had omitted to summon some witnesses in order to testify to the relationship of the

7 S. C. C., Aug. 22, 1840 (*Coll. P. F.*, n. 911); Instruction of 1883, n. 10.

8 S. C. C., Ventimil., May, 1888 (*A. S. S.*, t. 21, 162 ff.).

septimae manus, and was absent when the witnesses were examined. It is therefore required that the acts should contain all the minutes as described above, duly examined and approved by the defender, that he was never absent from any session, or if he was absent, that he afterwards took cognizance of all the proceedings.[9]

9 Instruction of 1883, n. 11. Instructive for defenders are the cases contained in the *Thesaurus S. C. C.,* also the cases published in the *A. S. S.* and *Analecta Ecclesiastica,* as well as the *Regulae servandae in judiciis apud S. Rom. Rotae Tribunal* in *A. Ap. S.,* II, 783 ff.

CHAPTER III

WHO MAY ATTACK MARRIAGES AND ASK FOR A DISPENSATION FROM A RATIFIED MARRIAGE

CAN. 1970

Tribunal collegiale nullam causam matrimonialem cognoscere vel definire potest, nisi regularis accusatio vel iure facta petitio praecesserit.

The board of judges cannot take cognizance of, nor decide, any matrimonial case, unless a regular accusation or a legal petition has preceded.

What a "regular accusation" means is determined in the following canon, which specifies the persons who are capable of "accusing" a marriage. A legal or lawfully drawn up petition would imply persons capable of petitioning.[1] However, since a petition implies the grant of a favor, it is evident that the petitioner should be capable of making and accepting the petition, and that it be addressed to the proper authority. Thus in case of a mixed marriage the Catholic party must make the petition and send it to the bishop or vicar-general or chancellor of the diocese in which the petitioner has his domicile or quasi-domicile.

WHO MAY BE PLAINTIFF

CAN. 1971

§ 1. Habiles ad accusandum sunt:

1.° Coniuges, in omnibus causis separationis et nullitatis, nisi ipsi fuerint impedimenti causa;

1 Instruction of 1883, n. 3. Perhaps the two terms convey one and the same idea: the *libellus litis* or writ of petition.

2.° Promotor iustitiae in impedimentis natura sua publicis.

§ 2. Reliqui omnes, etsi consanguinei, non habent ius matrimonia accusandi, sed tantummodo nullitatem matrimonii Ordinario vel promotori iustitiae denuntiandi.

The parties, therefore, should draw up a short and clear statement setting forth the reasons why they wish to have the marriage declared invalid, together with a request that it be declared null and void. They may make this petition orally before the court, whose secretary has to put it down in writing. But the petition may also be filed for separation only, which is a process essentially distinct from that aiming at a declaration of nullity. Canon 1971 establishes who may be plaintiff, *i. e.,* ask for a bill of separation or divorce by having the marriage declared invalid.

1. And first, either one or both of the contracting parties may present the bill to the episcopal court. The parties alone are admitted to attack their marriage on the ground of defective consent, whether this defect be caused by violence and fear, or error, or lack of will, or unfulfilled conditions.[2] If one party alone is conscious of defective consent, that party alone can lawfully present the petition. Concerning impotency, too, the only competent plaintiffs are the parties themselves, because they alone can know the fact and they alone are interested in the matter.[3] The Code, however, does not limit the parties' right to these cases. Hence any impediment which was, without their own fault, placed in the way to their lawful union may be used as a reason for impugning it.

2 Instruction of 1883, n. 36.

3 *Ibid.,* n. 46 (*Coll.,* Vol. II, p. 179).

The text says: "*nisi ipsi fuerint impedimenti causa.*" What this means is not clear. A *causa* may be either efficient, or final, or formal, etc. It is evident that the formal cause of an impediment is the law, either divine or human. A final cause can hardly be assigned in this connection, for it would be setting up an impediment to hinder a matrimonial union. Hence nothing else is left but the efficient cause. In other words, either one or both of the parties may have caused or produced the impediment. This may have been done either maliciously or without malice, sinfully or without sin. In the line of the twelve impediments, a sinful cause would be found only in rape, crime, and public honesty, because these three are really founded on unlawful actions due to human agency. There might also be question of a cause, though a purely material one, in cases of mixed religion and spiritual relationship. For the impediments of disparity of worship and mixed religion (though the latter is only prohibitive) arise from a union between two persons whom the Church has declared incapable of contracting marriage. Spiritual relationship exists between the parties if one was sponsor to the other, which may happen when one is baptized shortly before marriage.[4] We believe the intention of the lawgiver was to restrict that cause to a malicious or sinful, or at least deceitful action. In that case it would be merely an application of the well-known axiom that no one should be benefitted by a fraudulent act committed by himself ("*fraus sua nemini patrocinari debet.*") [5]

2. Besides the parties themselves, the *promotor iustitiae* or prosecuting attorney of the diocesan court may attack

4 We know of a case where a priest, by sheer distraction, asked the bridegroom to be sponsor for his bride. But luckily the former did not touch his godchild physically and hence contracted no relationship.

5 C. 15, X, I, 3.

a marriage because of impediments which are by nature *public*. Can. 1037 defines an impediment to be public when it can be proved in court. With the exception *perhaps* of impotency and crime, all the impediments are more or less of a public character. For certainly age, *ligamen,* consanguinity, affinity, spiritual and legal relationship, religious profession, sacred orders can be proved by documents, and public honesty presupposes notoriety. As to mixed religion there may be a real doubt, because the baptismal records of non-Catholic denominations are often carelessly kept. We said with the exception *perhaps* of impotency and crime, for even impotency might become known and proved, especially in case of castrated males and eunuchs. Yet since the Instruction of 1883 seems to exclude in cases of impotency all but the parties themselves, we hardly believe that the *promotor iustitiae* would have to proceed against them *ex officio*.[6] As to crime, a different view must be taken, because not only is this impediment of a public character, but the crime itself is directed against the public welfare. Hence if the attorney should have strong indications as to the existence of a crime, and especially if there were a rumor pointing to the existence of that impediment, he would have to order further, but cautious, investigation to be made, until the truth would appear or the doubt disappear.[7]

3. All others, even blood relations, *have no right* to attack a marriage, though they *may denounce* the nullity of a marriage to the Ordinary or promoter of justice. Who are these *"reliqui omnes"?* In the first place the relatives of the couple, because they are supposed to know better than outsiders of the existence of an impediment.[8]

6 For inst., male singers of an advanced age with a soprano or alto voice cannot but be suspected; cfr. Bened. XIV, *De Syn. Dioec.,* XI, 7, 2.

7 Instruction of 1883, n. 3.

8 C. 2, C. 35, q. 6; c. 3, X, IV, 18.

Besides these, every Catholic is allowed to "denounce"—not "accuse"—the nullity of a marriage. From this privilege no one is excluded. Hence the old law [9] which excluded from the right of denouncing such as acted from dishonest motives or had wilfully neglected denunciation at the time the banns were published, must be corrected.

ACCUSATION POST MORTEM

Can. 1972

Matrimonium, quod, utroque coniuge vivente, non fuerit accusatum, post mortem alterutrius vel utriusque coniugis ita praesumitur validum fuisse, ut contra hanc praesumptionem non admittatur probatio, nisi incidenter oriatur quaestio.

A marriage not "accused" during the life-time of both parties is after the death of either one or both presumed to have been valid, and against this presumption no proof is admitted, except as an incidental question or side-issue. The chief reason for this canon is to protect the legitimacy and hereditary rights of the offspring. Besides, it seems improper [10] to admit one to accusation after the death of a party who may be innocently slandered. Hence the S. Congregation could confidently assert in 1842 that never before had an accusation against the validity of a marriage been admitted after the death of one of the parties.[11] The reasons for such *post mortem* trials are generally to be sought in personal interests and material gain accruing from inheritance. However, says our text, if the question was raised *incidentally*, it *might be admitted*. Thus if the principal question or point

9 Cfr. X, IV, 18.
10 C. 7, X, IV, 17.
11 S. C. C., Sept. 17, 1842; July 30, Dec. 3, 1735 (Richter, *Trid.*, p. 278, n. 134; n. 135).

would be the legitimacy of the offspring, the next or incidental question would be the validity of the marriage.[12] But it may be added that the conjectural proofs for the validity of a marriage which is dissolved by death and impugned by some near relative after the death of one party, are readily admitted, especially if not the marriage tie itself, but its consequences are at issue.[13]

CAN. 1973

Soli coniuges ius habent petendi dispensationem super matrimonio rato et non consummato.

The married parties alone have the right to petition for a dispensation from a marriage ratified but not consummated.[14]

12 Cfr. c. 7, X, IV, 17.

13 S. C. C., Barcin., Dec. 16, 1893 (*A. S. S.*, t. 26, 407 ff.)—a very interesting case for defenders.

14 Of course the petition may be made *by* others, but it must be made in the name of the parties and at their request.

CHAPTER IV

LEGAL PROCEEDINGS

ARTICLE I

WITNESSES

CAN. 1974

Consanguinei et affines de quibus in can. 1757, § 3, n. 3, habentur testes habiles in causis suorum propinquorum.

Blood relations and *affines,* although otherwise excluded, may be admitted as witnesses in matrimonial cases of their kin, because these, as a Palea of the Decree says,[1] know their genealogy or pedigree better than strangers.

TESTIMONIUM SEPTIMAE MANUS

CAN. 1975

§ 1. In causis impotentiae vel inconsummationis, nisi de impotentia vel inconsummatione aliunde certo constet, debet uterque coniux testes, qui septimae manus audiunt, inducere, sanguine aut affinitate sibi coniunctos, sin minus vicinos bonae famae, aut alioquin de re edoctos, qui iurare possint de ipsorum coniugum probitate, et praesertim de veracitate circa rem in controversiam deductam; quibus iudex ad normam can. 1759, § 3, alios testes potest ex officio adiungere.

§ 2. Testimonium septimae manus est argumentum

1 C. 2, C. 35, q. 6; cc. 5, 22, X, II, 20; c. 3, X, IV, 17.

credibilitatis quod robur addit depositionibus coniugum; sed vim plenae probationis non obtinet, nisi aliis adminiculis aut argumentis fulciatur.

In cases of impotency or non-consummation, unless the facts are ascertained from other sources, each of the parties must produce witnesses, called of the seventh hand (*septimae manus*), who are related to the parties by blood or affinity, or at least neighbors of good reputation, or otherwise well-informed persons, who will testify under oath to the probity of the parties and their truthfulness concerning the controverted matter. To these the judge may *ex officio* add other witnesses. This testimony of the *septima manus* is a proof of credibility which adds weight to the deposition of the consorts, but it has not the force of full proof unless it is supported by other circumstances or arguments.

The *septimae manus* proof is of Germanic origin. It was adopted by Gratian [2] and by the Decretals.[3] It means that the husband should bring forward seven persons of either sex, and any age or condition, if possible of his own kin, who are acquainted with his character, actions, and conduct. In the same manner the wife should present seven relatives, friends, or acquaintances. Thus fourteen persons, after having been duly sworn, testify to the trustworthiness and truthfulness of the married couple. But they cannot directly testify to the non-consummation of the marriage, although some indirect statements may be elicited from them. Thus they may be asked whether the couple lived together affectionately, whether there were quarrels, whether medicine was used to cure impotency or a physician was consulted.[4]

2 C. 2, C. 33, q. 1, is from a letter of Greg. I, but the text has the interpolation of *septimae manus*.

3 Cfr. cc. 5, 7, X, IV, 15.

4 *Instructio Orient.*, tit. VI, art. 5 (*Coll.*, n. 1588).

But all these testimonies do not afford full proof unless they are supported by other evidence. Such an aid (*adminiculum*) or support would be found in the supplementary oath of the woman testifying to non-consummation.[5] But a relatively surer way is that proposed in the following canons. We say relatively surer, because in case the woman would have led a life of prostitution after a civil divorce, bodily inspection could hardly bring results.[6]

ARTICLE II

BODILY INSPECTION

CAN. 1976

In causis impotentiae aut inconsummationis requiritur inspectio corporis utriusque vel alterutrius coniugis per peritos facienda, nisi ex adiunctis inutilis evidenter appareat.

CAN. 1977

In peritis eligendis, praeter normas in can. 1792–1805 datas, serventur praescripta canonum qui sequuntur.

Cases of impotency and non-consummation require bodily inspection of both or one of the parties, which is to be performed by experts, unless circumstances — like those just mentioned — render it evidently useless. The experts must be chosen by the judges after consultation with the *defensor vinculi*. Besides, the following canons must be observed.

CAN. 1978

Ad periti munus ne admittantur qui coniuges priva-

5 C. 4, X, II, 19.

6 Cfr. *Am. Eccl. Rev.*, Vol. 9, 466, 376 (contains two decisions, but without date or source); in this case dispensation was granted on other canonical proofs.

tim inspexerint circa factum cui innititur petitio declarationis nullitatis vel inconsummationis; licet tamen hos tanquam testes inducere.

Those shall not be admitted as experts who have privately (as physician or midwife) examined the parties concerning the vital point upon which the petition for having the nullity of marriage declared or the non-consummation chiefly hinges; such private experts may, however, be introduced as witnesses.

CAN. 1979

§ 1. Ad inspiciendum virum, duo periti medici ex officio deputari debent.

§ 2. Ad mulierem vero inspiciendam duae obstetrices, quae legitimum peritiae testimonium habeant, ex officio designentur; nisi maluerit mulier a duobus medicis ex officio pariter designandis inspici vel id Ordinarius necessarium habuerit.

§ 3. Corporalis mulieris inspectio fieri debet, servatis plene christianae modestiae regulis et adstante semper honesta matrona ex officio designanda.

1. The *two physicians* who are to inspect the man are to be appointed *ex officio*. This means that they have to promise under oath that they will perform their duty conscientiously and without human respect.[7]

2. The two *midwives* who have to inspect the woman must be legally approved (by a state diploma or county or city certificate) and must also be appointed *ex officio*. Therefore they, too, have to be sworn in and must enjoy a good reputation.[8] But the woman may, if she so chooses, or if the Ordinary deems it necessary, be in-

7 *Instructio Orient.*, tit. VI, art. 5 (*Coll.*, n. 1588).
8 *Ibid.*

spected by two physicians to be appointed *ex officio*.

3. The inspection must be conducted with becoming Christian modesty and always in the presence of a worthy matron to be chosen *ex officio*. This matron is also obliged to take an oath and to keep the secret.[9]

CAN. 1980

§ 1. Mulieris inspectionem obstetrices vel periti, seorsum singuli, exsequi debent.

§ 2. Singuli medici vel obstetrices singulas relationes conficiant, intra terminum a iudice praefinitum tradendas.

§ 3. Potest iudex relationes ab obstetricibus confectas examini alicuius periti medici subiicere, si id opportunum existimaverit.

1. The midwives who perform the inspection on the woman must do it separately.

2. Each physician or midwife has to draw up a separate report within a term to be fixed by the judge. In this report, says an instruction of the Holy Office,[10] they may state the result of their inspection and what they think about the nature of the impotency, whether it is acquired or natural, absolute or relative. This report should be sworn to and handed to the chancellor of the matrimonial court.

3. The judge may, if he thinks it advisable, submit the report of the midwives to the examination of an expert physician, who should ascertain whether the inspection was made along scientific lines.[11]

9 *Ibid.* Of course, physicians and midwives are bound by professional secrecy.

10 *Instr. Orient.*, tit. VI, art. 5. How non-consummation in case of a woman destitute of ovaries and uterus may be proved we leave to physicians to decide; but they should not forget to mention that fact in their report, and what they think about impotency and sterility.

11 *Inst. cit., ibid.*

CAN. 1981

Peracta relatione, periti, obstetrices ac matrona, seorsum singuli, a iudice interrogentur, secundum articulos a vinculi defensore antea concinnatos quibus ipsi, praestiti iuramento, respondeant.

After the report has been received, the experts, the midwives, and the matron are to be questioned separately according to the points previously drawn up by the *defensor vinculi,* and must answer under oath.

CAN. 1982

Etiam in causis defectus consensus ob amentiam requiratur suffragium peritorum, qui infirmum, si casus ferat, eiusve acta quae amentiae suspicionem ingerunt, examinent secundum artis praecepta; insuper uti testes audiri debent periti qui infirmum antea visitaverint.

The verdict of experts is required also in cases of defective consent caused by insanity. They must, if the case admits, examine the patient as well as those acts of his which cause suspicion, according to the rules of their art (psychiatry). Besides, experts who have attended the patient before his illness should be heard as witnesses.

CHAPTER V

PUBLICATION OF THE ACTS — CLOSE OF TRIAL — SENTENCE

CAN. 1983

§ 1. Publicato processu fas adhuc est partibus novos testes, ad normam tamen can. 1786, super diversis articulis inducere.

§ 2. Si vero testes iam excussi super iisdem articulis antea propositis denuo audiendi sint, servetur praescriptum can. 1781, integro iure defensoris vinculi opportunas proponendi exceptiones.

1. Even after the publication of the process the parties are allowed to introduce new witnesses to testify on various points. To understand this ruling we must remember that the publication of the process takes place after all the evidence has been collected, before the discussion of the case begins and before sentence is pronounced. It means that the whole material, consisting of all the proofs given by the parties, the witnesses and the experts, is made known to the parties and their lawyers, so that these may inspect it, and, if they wish, demand a copy.[1] This is the *processus publicatio*. Now, in virtue of the ordinary rules,[2] new witnesses should not be admitted after the publication of the acts, lest the proceedings be drawn out indefinitely. Yet, because matrimonial trials are matters of great importance, the legislator permits the parties to bring new witnesses, provided no fraud or bribe is em-

1 Cfr. can. 1858 f. 2 Cfr. can. 1786.

ployed, and provided both parties consent and the attorney or defender does not object. The judge has to make a formal decree permitting the introduction of new evidence.

2. If witnesses who have already been examined are to be again questioned on the same points, the examination must be performed before the depositions have been published (*antequam acta seu testificationes publici iuris fiant*), provided the judge deems it necessary and there is no danger of a secret agreement or bribery.[3] The defender always has the right to object to the reintroduction of the same witnesses on the same points.

CAN. 1984

§ 1. Defensor vinculi ius habet ut in allegando, petendo et respondendo, tam in scriptis quam in defensione orali, audiatur postremus.

§ 2. Quare tribunal ad definitivam sententiam ne deveniat, nisi prius vinculi defensor interrogatus declaraverit sibi nihil deducendum vel inquirendum superesse.

§ 3. Si vero ante praefinitum a iudice iudicii diem defensor nihil deduxerit, praesumitur eum nihil iam deducendum habere.

1. The defender is entitled to be heard last, when allegations are made, petitions filed, or answers given, and he may exercise this right either in writing or by word of mouth.

2. Hence the tribunal shall not proceed to render a verdict, unless the defender has formally declared, upon request, that he has nothing more to bring forward or to inquire into.

3 Can. 1781.

3. If, however, the defender has brought forward nothing to the contrary before the day set for the trial, it is presumed that he has nothing more to say.

CAN. 1985

In causis quae spectant ad dispensationem matrimonii rati et non consummati, iudex instructor neque ad publicationem processus neque ad sententiam super ipsa inconsummatione et causis ad dispensandum deveniat, sed omnia acta una cum voto scripto Episcopi et defensoris vinculi transmittat ad Sedem Apostolicam.

If the case concerns a dispensation from a *matrimonium ratum non consummatum,* the judge who drafted the case may neither publish the acts nor pronounce sentence as to the non-consummation or the reasons for the dispensation, but must send all the acts together with the written view of the bishop and of the defender to the Holy See.

Note that only in case of a dispensation from a merely ratified marriage has the judge to abstain from giving sentence.[4] If the trial merely concerns impotency, the Ordinary is allowed to give sentence in the first instance, either for or against the nullity of the marriage (*constat vel non constat de impotentia in casu*). Thus also in other cases of impediments, of defect of consent and form.

From this canon it appears that, besides the three judges, there should be an *officialis* to preside over and conduct the trial and to determine the administrative rules for conducting cases.[5] Hence *index instructor* here

4 S. O., Aug. 6, 1890, ad 7 (*Coll.*, n. 1737).

5 Can. 1577.

means the *officialis* of the diocese. But since the Code[6] permits that in smaller dioceses the offices of *officialis* and vicar-general may be held by one and the same person, it is evident that the vicar-general would in this case act as *iudex instructor.* He would therefore be the *moderator,* as he was formerly called, and as such should draw up the case, according to the petition filed by the parties. As soon as he has received this petition he shall cause the chancellor or the secretary of the matrimonial court to put it down in writing, issue rules and ordinances in accordance with the general rules on trials and with those governing matrimonial trials in particular, which are conducive to the regular and orderly compilation of the acts, convoke the tribunal, summon the parties and their witnesses, and grant delays when justly demanded. All these things must be recorded in the acts by the chancellor or secretary.[7] But the *real judge* in matrimonial matters is the Ordinary of the diocese, or rather the board of three judges. Hence the matrimonial court should be composed as follows: the moderator (*officialis* or vicar-general); the three judges; the defender and the secretary. The bishop may be personally present at every session, but it is expedient that he leave the judgment to the tribunal, over which the *officialis* of the diocese presides.[8]

The three judges must proceed *collegialiter,* as a body, and give their verdict by majority vote.[9] This is the *first instance,* but it may be that an appeal is taken. Hence the Code proceeds as described in the following chapter.

6 Can. 1573, § 1.
7 Instruction of 1883, n. 9 (*Coll.,* n. 1587).
8 Can. 1578.
9 Can. 1577.

CHAPTER VI

APPEALS

Can. 1986

A prima sententia, quae matrimonii nullitatem declaraverit, vinculi defensor, intra legitimum tempus, ad superius tribunal provocare debet; et si negligat officium suum implere, compellatur auctoritate iudicis.

The *defensor vinculi* must, within the time granted by law, appeal to a higher tribunal if the first sentence was in favor of the nullity of the marriage. Should he neglect to do his duty, he may be compelled thereto by the judge.

The *time* within which an appeal may be made is ten days from the date when he has received knowledge of the first sentence.[1] But an appeal may be taken only if the first sentence declared the marriage null. If the sentence was in favor of validity, and the parties are satisfied, the defender shall abstain from appealing, and the whole trial may be considered as closed.[2]

Can. 1987

Post secundam sententiam, quae matrimonii nullitatem confirmaverit, si defensor vinculi in gradu appellationis pro sua conscientia non crediderit esse appellandum, ius coniugibus est, decem diebus a sententiae denuntiatione elapsis, novas nuptias contrahendi.

If the second sentence confirms the first given in favor of nullity, and the defender of the court of appeals (who

1 Can. 1881.

2 Benedict XIV, "*Dei miseratione*," § 8; *Instructio*, 1883, n. 25.

is a different one from that of the first instance) does not feel himself obliged in conscience to appeal, the parties are free to marry again after the expiration of ten days from the date when the second sentence became known to them. Pending the appeal, *i. e.,* during the time between the first and second sentence, the party in whose favor the nullity was declared in the first instance is not allowed to remarry; and if he or she should have attempted a marriage before the second sentence, they must be separated, or else they are to be treated as guilty of polygamy.[3]

CAN. 1988

Decreta matrimonii nullitate, Ordinarius loci curare debet, ut de ea mentio fiat in baptismorum et matrimoniorum regestis, ubi matrimonii celebratio consignata invenitur.

After the second sentence in favor of nullity, the Ordinary should see to it that the annulment of the marriage is duly recorded in the baptismal and matrimonial registers of the place where the marriage was contracted.

CAN. 1989

Cum sententiae in causis matrimonialibus nunquam transeant in rem iudicatam, causae ipsae, si nova argumenta praesto sint, retractari semper poterunt, firmo praescripto can. 1903.

Since no sentence in matrimonial trials ever becomes a *res iudicata,* a case may be reopened at any time, provided new proofs are offered; but these proofs must be of a weighty nature and supported by documents.

A *res iudicata* is a controversy definitively settled by a

3 Benedict XIV, "*Dei miseratione,*" § 9.

twofold identical sentence, or by one sentence from which no appeal has been taken within the legitimate term, or from which an appeal is not admissible.[4] Therefore, even if the nullity of a marriage had been confirmed by the second instance, and the parties entered a new union, the former case may yet be reopened. This is a *favor iuris* of matrimonial cases, because marriage is indissoluble and a matter of public welfare.[5] It follows that no prescription or lapse of time may be invoked against the right of attacking a marriage. However, since the trial is conducted on such rigorous lines, it would be unjust to listen to frivolous reasons or proofs already heard and refuted. Therefore *weighty* and *new reasons* must be proposed.[6] It is evident that a verdict given by the Holy See cannot be impugned upon the ground of can. 1989, or reversed by the Ordinary without notifying the Apostolic See.

It is advisable to have a summary statement drawn up before the trial is reopened.[7]

4 Can. 1902.

5 Smith, *Marriage Process*, p. 343.

6 Benedict XIV, "*Dei miseratione*," § 11. For this purpose the acts of all matrimonial trials are to be kept in the diocesan archives.

7 Leitner, *l. c.*, p. 558.

CHAPTER VII

CASES EXCEPTED FROM THE PRECEDING RULES

CAN. 1990

Cum ex certo et authentico documento, quod nulli contradictioni vel exceptioni obnoxium sit, constiterit de exsistentia impedimenti disparitatis cultus, ordinis, voti sollemnis castitatis, ligaminis, consanguinitatis, affinitatis aut cognationis spiritualis, simulque pari certitudine apparuerit dispensationem super his impedimentis datam non esse, hisce in casibus, praetermissis sollemnitatibus hucusque recensitis, poterit Ordinarius, citatis partibus, matrimonii nullitatem declarare, cum interventu tamen defensoris vinculi.

This canon will probably evoke a sigh of relief from more than one ecclesiastic who has to deal with matrimonial cases. For it dispenses with almost all the formalities of a regular trial, which always take time and money.

1. The *impediments* which are brought forward in order to have a marriage declared null and void are: disparity of worship, sacred orders, solemn religious profession, the bond of a previous marriage, consanguinity, affinity, and spiritual relationship,— seven in all. That the others are not included is owing partly to the nature of these impediments, partly to the difficulty of complying with the required conditions.

2. The *conditions* which govern the application of this canon are: (a) that the existence of the impediment be ascertained by a *reliable and authentic document,* which cannot be rejected or disregarded; (b) that it be

equally certain that *no dispensation* had been granted from the impediment.

Authentic documents are such as are reliable and trustworthy because written or issued by the proper authorities. Such are the genuine acts of the Roman Court, judicial acts and documents drawn up by an ecclesiastical notary, baptismal and matrimonial records kept in the archives of a diocese, parish, or religious community, and copies made from these originals. Such are also *civil documents* of a public character, issued according to the laws of the country. All these, ecclesiastical as well as civil documents, are presumed to be genuine until the contrary is proved.[1] Thus an "*affidavit*," if issued with the proper formalities, in case of a marriage, is *prima facie* evidence of such marriage in any court of Missouri,[2] and must therefore be considered an authentic document in the ecclesiastical court.

Private documents, the Code says elsewhere,[3] afford no full proof, and are excluded by our text. It has happened that a soldier without any commission from the authorities made an investigation concerning a Baptism. The result was considered insufficient, especially since the *defensor vinculi* was not present.[4] Had the soldier obtained an authentic document from an ecclesiastical court, the investigation could not have been objected to as purely private.

A document *quod nulli contradictioni vel exceptioni obnoxium sit,* is such a one as described above, provided it is authentic, no matter whether issued by the ecclesiastical or the civil authorities. The proof that it is not genuine would have to be furnished by the plaintiff (*actor*) or

1 Can. 1813 f.

2 Revised Statutes of Mo., sect. 4563.

3 Can. 1817.

4 S. O., June 10, 1896, Albany, N. Y. (*Coll.*, n. 1940).

his lawyer, not by the defendant (*reus*). Whether a paper received from a Protestant minister concerning Baptism is authentic must be decided from another viewpoint.[5]

It is furthermore required that *no dispensation* had been granted from said impediments. Therefore copies of all the dispensations forwarded by the diocesan court should be kept on file for cases of emergency, at least in the form of lists indexed according to the species of the various impediments. The Roman Court keeps its records in good order and in this respect may serve as an example to diocesan courts.

3. The Code adds *that in these cases the solemnities thus far mentioned* (in the preceding canons, which prescribe the regular trial) *may be omitted,* and the Ordinary, upon having summoned the parties, may declare the marriage null and void, provided the *defensor vinculi* is satisfied. This is a decided modification, not only of Benedict XIV's Constitution *"Dei miseratione,"* but also of former decrees[6] which required a summary trial when a marriage was to be declared invalid because of disparity of cult. Now the formalities of a regular trial may be omitted, and all that is required is certainty gained from authentic documents that no dispensation was granted, summoning of the parties, intervention of the defender, and a declaration of nullity. An appeal to a higher tribunal is not required if the defender is satisfied;[7] nor is recourse to the Holy See necessary in that case.[8] But can. 1988 must be observed.

5 This must be judged according to the rules given under mixed marriages. It would also require an *affidavit* issued by civil authority in order to authenticate it.

6 S. O., June 10, 1896 (*Coll.*, n. 1940).

7 S. O., June 5, 1889 (*Coll.*, n. 1706).

8 S. O., June 21, 1912 (*A. Ap. S.*, IV, 443).

CAN. 1991

Adversus hanc declarationem defensor vinculi, si prudenter existimaverit impedimenta de quibus in can. 1990 non esse certa aut dispensationem super eisdem probabiliter intercessisse, provocare tenetur ad iudicem secundae instantiae, ad quem acta sunt transmittenda quique scripto monendus est agi de casu excepto.

If the defender prudently believes that the impediments mentioned in the preceding canon did not exist or have probably been dispensed from, he is obliged to appeal the case to the judge of the second instance, to whom all the acts must be transmitted with the notification that the case belongs to the excepted class. Reasons for doubt may arise from the nature of the documents. Thus a pastor's record, although signed and sealed by the pastor, may be doubtful because not verified by the episcopal court.[9] A case might be made out against spiritual relationship, because the names of the sponsors were illegibly written or there was doubt as to identity, especially if the name is a very common one. In cases of consanguinity error is possible as to the degree. Concerning the marriage tie doubts may arise as to the examination of the free status of the contracting parties, etc.; much depends on the character of the papers and the attitude of the defender.

CAN. 1992

Iudex alterius instantiae, cum solo interventu defensoris vinculi, decernet eodem modo de quo in can. 1990, utrum sententia sit confirmanda an potius pro-

[9] Instruction of 1883, n. 31 (*Coll.*, n. 1587).

cedendum in causa sit ad ordinarium tramitem iuris, quo in casu eam remittit ad tribunal primae instantiae.

The judge of the second instance, with the sole intervention of the defender, shall decide, as stated in can. 1990, whether the first sentence is to be confirmed or a regular trial instituted; in the latter case the matter is to be referred back to the tribunal of the first instance.

APPENDIX I

SOME SPECIMEN PETITIONS FOR MATRIMONIAL DISPENSATIONS

For Mixed Marriages or Disparity of Worship

To the Rt. Rev. Bishop N. N.:

N....., a Catholic of this parish, wishing to marry N....., a non-Catholic, humbly prays the Right Rev. Bishop, in virtue of the faculties granted by the Holy See, to grant a dispensation from the impediment of mixed religion (or disparity of cult).

The non-Catholic party has complied with the conditions prescribed by law (can. 1061).

Or if not complied with in writing: The non-Catholic party refuses to give the promises in writing, but has made an oral promise to the same effect. The reasons are: angustia loci, aetas superadulta, periculum matrimonii contrahendi coram ministro acatholico, etc.

Please find enclosed $.... for alms.

To the Apostolic See:

Ad pedes Sanctitatis Vestrae provolutus humillime rogat N. Catholicus super impedimento disparitatis cultus, quatenus matrimonium inire valeat cum N. acatholica non baptizata, vel saltem valde dubie baptizata. Promissiones prout de iure requiruntur sunt praestitae (vel saltem oraliter factae sincere).

Causae vero sunt.....

Pro qua gratia, . . .

The Ordinary should write below the signature, or on a special paper: Petitionem hanc enixe commendat Ordinarius oratoris, cuius rationes, in quantum scit, veritate nituntur, et promissiones sincere factas esse credit.

Pro Sanatione in Radice

To the Bishop:

N....., (fictitious name), wishing to validate his (or her) marriage with B....., humbly prays the Right Rev. Bishop, in

virtue of the faculties granted by the Holy See, to grant a revalidation (*sanatio in radice*), removing the impediment of (for ex. crime of adultery with promise of marriage), which he (or she) concealed at the time of marriage with B., who is still ignorant thereof.

The reasons for requesting a *sanatio in radice* are, on the one hand, scandal and the danger of incontinence resulting from separation if imposed; on the other hand, impossibility of obtaining the renewal of B.'s consent without serious danger of dissension.

Double Impediment

(See Can. 1050)

Beatissime Pater:

Exponitur humiliter Sanctitati Vestrae pro parte oratricis N., dioecesis N., ex loco N., quod cum dicta oratrix catholicae religioni addictissima nubere intendat viro N. non baptizato, cui etiam coniuncta est in secundo gradu affinitatis lineae collateralis, Sanctitatem Vestram humillime rogat, quatenus benigne dispensare dignetur de hoc duplici impedimento. Oratrix est vidua tribus liberis onerata, quorum senior quinquennium non excedit. Insuper propter res familiares ipsius mulieris loco huic adnexas vix alium virum invenire poterit quippe cum locus ipse acatholicis potius quam catholicis abundet et numerum focularium 100 non superet.

Pro qua gratia. . . .

Ita res se habere parochus oratricis testatur, quapropter hunc supplicem libellum enixe commendat.

N. N.
Episcopus Ordinarius Dioecesis N.

For a Sanatio in Radice to the S. Poenitentiaria

Beatissime Pater:

Ad pedes Sanctitatis Vestrae humiliter exponit parochus loci N., dioecesis N., in Statu N. Mulier quaedam nomine (fictitious name), cum esset legitime coniuncta viro (fictitious name), carnaliter cognita fuit a Ioanne, cui post primi mariti mortem nupsit in facie ecclesiae. At obstare videtur impedimentum criminis, quippe cum non solum adulterium commisit cum dicto Ioanne,

verum etiam serio promisit perdurante eodem legitimo matrimonio se nupturum ipsi post viri mortem. Insuper fatetur mulier quod vir praesens ipsi patefecerit se nunquam fuisse baptizatum ante eorum matrimonium, quamvis tamquam catholicus se gesserit semper. At momento periculi sat proximo mortis ipse peterit baptismum, cumque nullus sacerdos poterit haberi aut adiri convenienter mulier ipsum rite baptizavit. At post recuperatam valetudinem noluit vir renovare consensum, quocumque modo oblatum, et mulier timens, ne propter anteactae vitae suae consuetudinem praefatus vir ipsam forsitan relinqueret et prolem reclamaret acatholicis tradendam, rogavit instanter, ut Sanctitas Vestra saluti eius necnon prolis benigne consulere dignetur, quatenus opus sit, per sanationem in radice. Quoad publicitatem horum impedimentorum in quantum scio, nullus est in loco isto, qui hos coniuges non crederet veros, vel quidquam mali suspiceret, et quominus divulgaretur vix timendum est.

Pro qua gratia. . . .

N. N., Parochus.[1]

1 Cfr. Pyrrhus Corradus, *Praxis Dispensat. Apost.* (Migne, *Cursus Theol.* Vol. xviii); Putzer, *Commentarium in Facult. Apost.*, ed. 4a, pp. 122 ff.

APPENDIX II

(See Can. 1099, § 2, p. 303)

It may be worth while to add a few observations on this section, especially since Sabetti-Barrett (*Theologia Moral.* 27th ed. 1919, p. 940), has drawn attention to the same. Our canon evidently enumerates three classes of persons who are, or are not, respectively, obliged to observe the Catholic form of marriage. The first class is that of *Catholics,* whether they are such now, at the moment of marriage, or have been such previously and fallen away. We will designate these by the letter *A.* The second class is that of *non-Catholics* who never belonged nor now belong to the Catholic Church, regardless of whether or not they were baptized. The letter *B* shall designate them. The third class comprises persons born of non-Catholic parents, but baptized in the Catholic Church, though not raised as Catholics. The letter *C* shall stand for these. Putting the three classes into a mathematical schema we have the following possibilities:

If A marries A — Bound by Catholic form.
If A " B — " " " " .
If A " C — " " " " .
If B " A — " " " " .
If B " B — Not bound by Catholic form.
If B " C — " " " " " .
If C " A — Bound by Catholic form.
If C " B — Not bound by Catholic form.
If C " C — *Then what?*

We believe they are obliged to observe the Catholic form. Our reason is: C forms a class for itself, distinct from class B, and as the text states that one in Class C is not bound to observe the form when he marries one of Class B, the Code manifestly wishes to restrict that freedom from the observance of the law to the sole case of a marriage between C and B. Otherwise the lawgiver would have undoubtedly stated: when

they marry among themselves — *quoties inter se contrahant.* Hence the wording, it seems to us, taken in its strict sense, would oblige parties in Class C to observe the form if they marry among themselves. The objection that they are ignorant of the law, and practically spurn it, proves nothing, for it could be urged also against § 1 of our canon, because should-be Catholics who have fallen away and marry among themselves, or with non-Catholics, are also bound by the Catholic form. The old principle that by Baptism one is bound to obey the ecclesiastical law is here again apparent (can. 87). That non-Catholics (in the strict sense) are exempted is an exception and must be strictly interpreted.

APPENDIX III

In cases where doubts arise as to whether baptism was conferred at all, or conferred validly, and, consequently, whether a marriage contracted between two non-Catholics, or between a Catholic and a non-Catholic, was valid, the following rules[1] may with some safety be applied, since they are based upon official decisions.

1. A marriage contracted between a Catholic, or a non-Catholic who has undoubtedly been baptized, and a non-Catholic whose baptism is doubtful, is to be considered valid.

2. A marriage contracted between two non-Catholics, if the baptism of both parties is doubtful, must be held valid.

3. *Invalid* is a marriage contracted between a party whose baptism is *doubtful* and one who *certainly* never was baptized.

However, this last rule now, after May 19, 1918, must *not* be applied to such marriages as are contracted between strictly non-Catholics, *i.e.,* such as never have been Catholics either by baptism or conversion, on account of can. 1070.

On rules 1 and 2 see S. O., Nov. 17, 1830 (*Coll. P. F.,* n. 821):

"R. 1. Quoad haereticos quorum sectae ritualia praescribunt collationem Baptismi absque necessario usu materiae et formae essentialis, debet examinari casus particularis.—2. Quoad alios qui iuxta eorum rituale baptizant valide, validum censendum est Baptisma. Quoad si dubium persistat, etiam in primo casu, censendum est validum Baptisma in ordine ad validitatem matrimonii."

S. O., Sept. 9, 1868 (*Coll. P. F.,* n. 1334):

"1. Utrum, in casu dubii de valore baptismi, qui ita baptismum dubium acceperunt, in iudicando de aliis difficultatibus, v. g. circa matrimonium, iaponenses ut christiani, vel adhuc ut infideles considerandi sint.

"2. Utrum si dubium de valore baptismi remaneat, et S. Congregationi solvere dubium non visum sit opportunum, de his qui

1 Wernz, *Ius Decretalium,* ed. 2, 1912. Vol. IV, 2, p. 384 f.

sic dubie baptizati sunt, in rebus quae ad matrimonium spectant, ac si vere et valide baptizati fuissent iudicandum sit, vel non.

"R. Ad. 1. Generatim loquendo, ut christiani habendi sunt ii de quibus dubitatur an valide baptizati fuerint.

"Ad. 2. Censendum est validum baptisma in ordine ad validitatem matrimonii."

On rule 3 see S. O., July 14, 1880 (*Coll. P. F.*, n. 1536):

"1. Matrimonium dubie baptizati cum non baptizata estne validum?

"2. Matrimonium duorum dubie baptizatorum estne validum etiamsi sint consanguinei, affines, etc.

"R. Ad. 1. Matrimonium esse habendum uti invalidum ob impedimentum cultus disparitatis.

"Ad. 2. Matrimonium habendum esse ut invalidum ob impedimentum consanguinitatis vel affinitatis."

S. O., Feb. 4, 1891 (*ibidem*, n. 1746):

"Qui invalide baptismum receperunt, tamquam ethnici habendi sunt, ac proinde si isti matrimonia inter se contraxerunt, nisi obstet aliquod impedimentum iure naturae dirimens vera habenda erunt. Qui valide aut dubie baptizati fuerint, ii subsunt impedimentis etiam iure ecclesiastico dirimentibus.— At fieri potest ut una pars valide aut dubie, altera vero invalide baptizata fuerit. Hoc in casu eorum matrimonium nullum erit ob cultus disparitatem."

APPENDIX IV

(On Canons 1048, 1063, and 1139.)

Our opinion was asked on the following case: James, a Catholic, had contracted marriage with Gemma, a baptized Episcopalian, A. D. 1913, but before a non-Catholic minister, therefore invalidly, on account of the form prescribed having been neglected (can. 1099). Now, A. D. 1920, he wishes to return to the Church and receive the Sacraments. His would-be wife consents to leave him perfect freedom in the exercise of his religion, is also willing to renew her consent before a Catholic priest and two witnesses, but absolutely refuses to guarantee at the present time to have the children brought up as Catholics. What is to be done?

1. According to can. 1139, 1, the marriage could be healed in the root, because it was invalid on account of defective form.

2. Can this *sanatio* be applied? A decree of the Holy Office, Dec. 22, 1916 (*A. Ap. S.*, Vol. IX), reads that in our case the *sanatio* rather than convalidation with renewal of the consent before the priest and two witnesses, should be applied, that is to say, healing in the root is preferred to simple convalidation; most probably in order not to expose the sacred minister to an (at least passive and illicit) *co-operatio in sacris*. But what about the divine-natural law which forbids granting a dispensation when the precautions are not guaranteed? For, as stated above, the non-Catholic party absolutely refuses to guarantee the Catholic education of the children. Here we can only state that the Supreme Pontiff, and he alone, can declare whether the divine-natural law which requires the guarantee of Catholic education is binding in that particular circumstance and instance. A reason for benign interpretation lies in the promise of the non-Catholic party to permit the husband to exercise the Catholic religion with perfect freedom. This concession may pave the way to the other promise being made, at least tacitly. Besides the sincere desire of being and living as a Catholic is to be greatly valued.

3. Now the question arises whether our bishops enjoy the power of applying the *sanatio in casu.* According to the decree of Aug. 2, 1918, it would seem that our Ordinaries and those of Great Britain have that power (*supra,* p. 114). However, we would not venture to vindicate it in the case in question. For although the *sanatio* itself, as such, would cause no difficulty, because can. 1139, 1, would admit and the decree of Aug. 2, 1918, would not contradict it, yet there is an obstacle. For, as stated above, the divine-natural law requiring Catholic education is here jeopardized and needs a declaration, which, according to the view of the School, can only be given by the Supreme Pontiff, *i.e.,* by the Holy Office. This was the stand taken by the Holy Office in the above-mentioned decree. The Ordinary had asked whether the faculty of healing in the root — which he had already obtained from the Apostolic See — was contained in the faculty of healing in the root mixed marriages which were invalidly contracted on account of clandestinity or non-observance of the form presented by the "*Ne temere.*" The answer was that it was *not* contained therein and that therefore the Holy Father should be asked for the favor of healing all marriages invalidly sanated by the bishop.

Hence the case in question would have to be sent to the S. Congregation of the Sacraments, which will ask at least the *parere* or view of the Holy Office.

"Ordinarius Dioecesis N., obtenta iam facultate sanandi in radice matrimonia mixta, nulla ex capite clandestinitatis quia non celebrata ad normam Decreti 'Ne Temere,' quando pars acatholica renuit se sistere coram parocho catholico, quaerit nunc:

"1) Utrum quando pars acatholica non renuit se sistere coram parocho catholico, renuit tamen omnino praestare debitas cautiones, providendum sit per dispensationem et renovationem consensus coram parocho catholico passive se habente, vel potius per sanationem in radice: et quatenus providendum sit per sanationem in radice,

"2) Utrum facultas sanandi in radice in hoc secundo casu comprehensa censenda sit necne in facultate iam obtenta sanandi in radice matrimonia mixta, nulla ex capite clandestinitatis, vel

"3) Utrum peti debeat an non nova facultas a S. Sede.

"In plenario conventu Supremae Sacrae Congregationis Sancti Officii, habito feria IV, die 20 nov. 1912, propositis suprascriptis dubiis, Emi ac Rmi Dni Cardinales in rebus fidei et morum Inquisitores Generales, omnibus mature perpensis, respondendum decreverunt:

"Ad Ium, Negative ad primam partem, affirmative ad secundam.

"Ad 2um, Non comprehendi.

"Ad 3um, Provisum in secundo. Et supplicandum SSmo ut sanare dignetur in radice matrimonia ex hoc capite nulla quae usque adhuc invalide ab Episcopis sanata fuerint.

"Et sequenti feria V, die 21 eiusdem mensis, SSmus D.N.D. Pius divina providentia PP. X, in solita audientia R.P.D. Adsessori eiusdem Supremae Sacrae Congregationis impertita Emorum Patrum resolutionem benigne adprobare et confirmare et sanationem in radice matrimoniorum quae ex hoc capite nulla usque adhuc invalide ab Episcopis forte sanata fuerint largire dignatus est.

"Contrariis non obstantibus quibuscumque.

"Datum Romae, ex Aedibus S. Officii, die 22 decembris 1916.

"Aloisius Castellano, S. R. et U. E. Notarius."

APPENDIX V

INTERPRETATIONS OF THE PAPAL COMMISSION

Canon 1098, see page 293 sqq.: The mere fact of the absence of the pastor is not sufficient to contract marriage before two witnesses only, but a moral certitude of his absence, obtained either from notoriety or investigation is required. (*Commissio Pontificia,* 10 Nov., 1925; *A. Ap. S.,* 1925, Vol. XVII, p. 583).

Canon 1102, § 2, see page 309 sq.: Not only the *Missa pro sponsis* is forbidden, but any other, even private, Mass, if this may be taken as an adjunct to the wedding ceremony. (*Comm. Pont.,* l. c.).

Canon 1964, see page 406 sq.: A wife maliciously deserted by her husband can regain her own proper domicile only in case she has obtained a decree of perpetual or temporary separation from the ecclesiastical court. (*Comm. Pont.,* July 22, 1922; *A. Ap. S.,* 1922, Vol. XIV, 526).

APPENDIX VI

Matrimonium Ratum, non Consummatum (Can. 1963)

The Sacred Congregation of the Sacraments on May 7th, 1923, issued a special instruction on the mode of procedure in case of a dispensation from a *matrimonium ratum tantum.* It consists of three parts: (I) The Decree itself; (II) The Rules to be Observed; (III) An Appendix containing Formularies.

I. The *Decree* solemnly states that if, by fraud or carelessness on the part of the parties or witnesses, the contrary fact, *viz.*, the consummation of marriage, was concealed, the papal dispensation does not dissolve the previous marriage. The parties, therefore, who petitioned for the dispensation are still bound by the former tie and the subsequent marriage is null and void. Hence the matrimonial judge is strictly enjoined to warn the parties, witnesses, and experts of the fatal consequence of any fraudulent or unfounded answer, proof or report.

II. The *Rules* to be observed in non-consummated marriage are contained in fifteen (15) chapters as follows:

1. *The Competent Court*

The diocesan court is competent only if endowed with the necessary faculties, to be obtained from the S. C. Sacr., as per can. 1962–1963. Insufficient evidence must be supplemented and then forwarded to the S. Congregation. If a matrimonial case is tried for another reason than non-consummation, for instance, on the ground of fear, and an incidental doubt as to non-consummation arises in the course of the trial, the parties are allowed to ask the Holy See for a dispensation from the non-consummated marriage. And by virtue of delegated power the diocesan judge hereby receives the faculty to proceed, *in casu*, according to the rules here laid down.

2. *The Petition for Dispensation*

Only the parties are allowed to ask for the dispensation, and they write as *oratores,* not *actores.* The petition must contain a truthful statement of facts and is to be addressed to the Holy Father and forwarded to the S. Congregation for Sacramental Discipline (Cancellaria Apostolica, Corso Vittor Emmanuele, Rome, Italy).

The competent bishop through whom the matter is handled is anyone named in can. 1964; but also the Ordinary of the diocese in wnich the *orator hic et nunc* lives. Even if the party who asks for the dispensation is a non-Catholic, the local Ordinary may send the petition to the Holy See, but must add some necessary information.

The local Ordinary as well as pastors should endeavor, if there is any prudent hope, to reconcile the parties. If non-consummation was procured by onanism, the parties, if both are guilty, must be told that the case cannot be prosecuted. If the *orator* is innocent or repentant, the case can go on, but it must be reported to the S. Congregation.

3. *The Diocesan Court*

The Ordinary, having received the necessary faculties from Rome, may use the matrimonial court, *in casu,* but may also choose other ecclesiastics, unless the faculties read otherwise. These clergymen must have the qualities prescribed in can. 1607, § 1. The Ordinary may also subdelegate a judge. But all those who compose the court must suffer from no suspicion of gain or damage or grudge, nor may relationship of blood or affinity between the parties and the persons of the court be tolerated; otherwise the *actio exceptionis* is to be applied (can. 1613 f.). At the first meeting all the clergymen composing the tribunal must take the oath.

4. *The Duties of Judge and Assessors*

After the bill for prosecution has been handed to the judge, the latter will start with the judicial examination and the investigation into the evidence. This is to be gathered from (a) the sworn testimony of husband and wife, (b) the testimony of *septimæ manus* of each party, (c) bodily inspection conducted by

experts, (d) authentic documents of every kind, (e) circumstantial evidence.

For the rest, see the instruction in the Code, as far as the judge (can. 1840–1843, 1570, 1587, 1770), the *defensor vinculi* (can. 1968 f.), and the actuary are concerned. The actuary may receive assistance, provided the *defensor* has first been asked his opinion.

5. *Beginning of the Trial and Summons*

If necessary, the trial may be conducted in several meetings, and the judge may decide *in casu.* In the first session, which is considered complete even if not all officers are present, the judge will communicate the following: (a) the credentials from the S. Congregation, (b) the letters of the Ordinary in case of subdelegation, (c) the appointment of the defender and the actuary, either already made or to be made, (d) choice of official substistitutes, (e) the bill of the *orator* preliminary to the investigation, (f) taking of the oath. The summons are made according to the Code (can. 1715–1720; 1843).

6. *The Oath to be Administered to the Parties, Witnesses, and Experts, and the Questionnaire*

First the judge must administer the oath to the parties on the Gospel book. If they refuse, the fact must be noted in the acts. The judge should also admonish them of the gravity of perjury and the penalties for this crime (can. 1743, § 3). Then the examinations proceed, as laid down in the Code (can. 1772–1781).

The acts must be taken down in Latin, and all documents which are not written in either Latin, Italian, or French, must be translated into Latin. If an interpreter is engaged, he must take oath concerning the truthful interpretation and the keeping of the secret.

7. *Examination of the Parties*

The party first to be asked is the *orator.* After the oath has been administered the judge will ask the questions previously prepared by the *defensor* and offered to the judge in a sealed envelope. The judge may also put other questions. If both parties asked for a dispensation, it is becoming to ask the wife first.

After some general questions the more particular ones must be submitted. If the wife accuses the husband of either relative or absolute impotency, the husband must be asked to submit to bodily inspection.

The party must also be questioned when and from whom she or he had learned that the Roman Pontiff can dispense. This question may be omitted if the judge has otherwise ascertained the source. Also the reason for the dispensation must be asked. The parties must be examined over and again, if their answers are notably at variance. Then the judge must demand the deposition of the *septimæ manus.*

8. *Introduction of Witnesses and other Proofs*

Although there ought to be seven (7) witnesses for each party, a less number is sufficient, if more cannot be had (see can. 1975). Besides these witnesses others may be added *ex officio.* If the parties insist on knowing the names of the witnesses adduced by the opponent, this petition may be granted. Bodily inspection is, *per se,* always required unless circumstances render it useless, for instance, if the woman is a widow.

9. *The Septimæ Manus Witnesses*

Concerning the meaning of the seventh-hand proof, see can. 1975 (*supra,* pp. 422 f.). First the seven persons on the part of the *orator* must depose, after having given oath. These persons are the nearest or remote relatives. Before they are dismissed from the witness stand the answers of the party who introduced them should be read to the witnesses, unless the judge deems it infeasible. But the depositions made by the witnesses must be read to them. In examining these witnesses, the questions as to from whom, how, and when they heard the depositions made must never be omitted.

10. *Other Witnesses*

If the judge suspects collusion or deems the deposition of the seven witnesses insufficient, he should demand, *ex officio,* other witnesses. If bodily inspection neither proves nor excludes impotency, or if the bodily integrity of the woman cannot be proved thereby, and the lesions of the tissues may have been caused by

other causes than matrimonial use, the judge will decide whether other proofs and witnesses are required.

11. *Documents*

Concerning these consult can. 1812–1824. Documents only prove if they are authentic and genuine. Private papers, for instance letters, prove for or against the writer like an extra-judicial confession. It is for the judge to make prudent use thereof if it will help the case.

12. *Circumstantial Evidence*

Since it is not to be supposed that a marriage remains unconsummated, the fact of non-consummation must be carefully probed. The fact of cohabitation constitutes legal presumption of consummation (can. 1015, § 2). Non-consummation generally arises: (a) from the defect of matrimonial consent, (b) from compulsion and fear, (c) from aversion and hatred that arises at the very beginning of the conjugal state, (d) from either absolute or relative impotency. And any one of these speaks in favor of non-consummation. The external mode of conjugal life and its circumstances make up what is known as circumstantial evidence, which may be either light, grave, or very grave. And it is the duty of the judge and defender to find out to which of the causes non-consummation may be attributed.

13. *Bodily Inspection*

This is required, as a rule, concerning the woman. But the man may also be subjected to it. If they refuse, the judge has to investigate the cause of the refusal. In case the woman has been already deflowered, or if consummation was impossible by reason of time or place being entirely wanting, the inspection may be omitted, but the omission is to be noted in the acts. The judge, having heard the *defensor,* selects the experts, *viz.,* the physicians and midwives. Those who are not allowed as witnesses cannot act as experts (can. 1757) nor such as are related to the parties or suspected of aversion or hope of great gain or dishonesty. Physicians or midwives who have privately examined one of the parties may not serve as experts, but their deposition may be admitted as that of witnesses.

Two midwives must inspect the woman, who, however, is allowed to choose two physicians if she prefers. If two cannot be found, one physician and one midwife, or even a capable married woman may serve. These have to proceed as stated in can. 1979–1980. The findings must be made according to can. 1981. If their results are contradictory, the experts may be confronted to explain the contradiction, or a third expert may be called in. All that must be put down in the acts.

14. *Closing of the Case*

The judge shall close the case only after the declaration of the *defensor* that nothing else is left to be done and after having heard the parties. Before the issuance of the decree of closure, the judge will carefully compare the depositions to see whether there is anything incomplete, contradictory or ambiguous in them. Should he find something of that kind, he must, with the advice of the *defensor,* summon the parties or witnesses in order to correct the defects. The *defensor* will examine the acts before the closing of the case.

After the case is closed, the judge does not issue a decree of the publication of the acts or a sentence as to non-consummation or as to the reasons for dispensation. But he may, *audito defensore,* permit the parties or one of them to learn the contents of the acts, always provided that there be no collusion between the parties or tampering with the acts.

The closed case with all its documents must be delivered into the hands of the *defensor,* who will probe them and examine whether all the rules herein laid down were observed, and make his notes. Then all the acts together with the *votum* (opinion) of the bishop and that of the *defensor* must be forwarded to the S. Congregation. If the episcopal see is vacant, the administrator *ad interim,* or the administrator apostolic, or another bishop who has taken the competent bishop's place must give his opinion. These rules must always be observed, and in case of deviation therefrom, this fact must be accounted for by the judge in the acts. It is the bishop's duty to watch over their observance and he may inspect the acts at any time during the process. He may, furthermore, during the time of the process remove the judge as well as the *defensor* if there be a grave reason to do so. But the Holy See must be informed of this fact when the acts are sent.

These acts (*acta causae* or *acta processus*) must be forwarded to the S. Congregation in an authentic copy together with an index of all the acts and documents (can. 1644). If it should prove too inconvenient, on account of expenses or for another reason, to forward an authentic copy, the original acts (in any language) may be sent, provided the transmission can be safely made.

15. *The Rescript of Dispensation and its Dispatch*

The rescript is granted directly by the Roman Pontiff, and dispatched in the form of a rescript *in forma gratiosa* (a rescript of favor or grace) by the Cardinal Prefect of the S. C. of Sacramental Discipline or his *locum tenens,* also signed by the Secretary or sub-Secretary of the same S. C. The moment from which the effect of the dispensation is to be reckoned is the day on which the Supreme Pontiff has granted the dispensation, provided, however, that on that day the non-consummation as well as the reasons for the dispensation really existed. If either one of these is not verified, the papal rescript is null and void (can. 41). The papal grant includes, also, the dispensation from the impediment arising from adultery with the promise of marriage or attempted marriage (see above, pp. 195 ff.).

The rescript is addressed to the *orator,* who has to show it to the Ordinary (can. 51). Besides, the S. C. will forward an authentic copy to the Ordinary, who will then notify the pastor in whose parish the former marriage was performed, and also notify the pastor in whose parish the husband or wife was baptized, that he may record the dispensation in the matrimonial and baptismal books (see *A. Ap. S.,* 1923, Vol. XV, pp. 389 ff.)

III. Formularies.

The *Instructio* has an appendix which offers thirty-four formularies for such cases. The text, therefore, need not be precisely the same as offered; but it would be hard to find better and more appropriate ones. Here we insert only one, n. 1, which is for the petitioner, *orator* or *oratrix.*

Supplex Libellus Uxoris Oratricis

Beatissime Pater,

N. N., filia . . . , e dioecesi . . . , civitate . . . , annos nata . . . ,

conditione . . . , domicilium habens in civitate . . . , via . . . , sub paroecia . . . , ad pedes Sanctitatis Vestrae humiliter provoluta, quae sequuntur exponit:

Die . . . , mense . . . , anno . . . , oratrix, tunc annum agens . . . , praemissis denunciationibus a iure statutis ac ritu civili, matrimonium in paroeciali ecclesia . . . , cum N. N., filio . . . , e dioecesi . . . et civitate . . . , tunc annorum . . . , professione . . . , rite contraxit.

Sed hoc matrimonium, contra oratricis ingenium, ad exitum perductum fuerat ab eius matre, quae omnem movit lapidem ut filiae animum sibi conciliaret; et cum nullum ab eiusmodi nuptiis daretur effugium, oratrix ad matrimonium celebrandum accessit, sperans fore, ut sensim sine sensu amor erga virum enasceretur.

At spem fefellit eventus, nam coniugali consortio vix instituto, vir pravam indolem pandidit, ideoque defectus amoris in aversionem prorupit. Quapropter quindecim ab inito matrimonio diebus elapsis, vir, oratrice relicta, ad paternam domum remeavit; postero autem die, ipsa, urgente matre, virum assequi debuit; cum ipso tamen vix quinque diebus transactis, ad matrem reversa est, malens potius mori, quam cum eo intolerabilem vitam ducere.

Tum ex hoc capite vir separationem a civili tribunali petit atque obtinuit. Oratrix vero, apprime sibi conscia de non secuta matrimonii consummatione tum ob perversam viri voluntatem, tum ob defectum amoris, imo aversionem ipsius oratricis, ad pedes Sanctitatis Vestrae confugit, Apostolica dispensationem super matrimonio rato et non consummato misericorditer implorans.

Rationes autem ad petendam dispensationem sunt: 1. invincibilis oratricis aversio erga virum, absque ulla spe reconciliationis; 2. incontinentiae periculum, attenta eius iuvenili aetate; 3. desiderium transeundi ad alias nuptias, eidem nuper oblatas.

Et Deus, etc.

Datum . . . , die . . . , mensis . . . , anno . . .

N. N. (Subscriptio, si fieri potest, manu ipsius oratricis).

Si libellus detur a viro, similiter exaratur, mutatis mutandis, genuina peracta factorum expositione.

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